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IN THE

Supreme Court of the United States

LEGAL SERVICES FOR NEW YORK CITY, SOUTH BROOKLYN LEGAL SERVICES, and FARMWORKER LEGAL SERVICES OF NEW YORK,

Petitioners,

v.

LEGAL SERVICES CORPORATION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PETER M. FISHBEIN
JOSEPH M. DRAYTON
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022-3598
(212) 836-8000

BURT NEUBORNE
Counsel of Record
LAURA K. ABEL
DAVID S. UDELL
REBEKAH DILLER
DAVID H. GANS
BRENNAN CENTER FOR JUSTICE AT NYU LAW SCHOOL
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6737

Attorneys for Petitioners

207537

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Does 45 C.F.R. § 1610.8, App. 169a, as applied to Petitioners, violate the First Amendment to the United States Constitution by imposing an extremely burdensome condition on the receipt of federal funds that requires Petitioners to maintain wasteful and duplicative physically separate legal programs, staffed by separate personnel, in order to utilize private funds to provide a full spectrum of legal services to the poor?

2. Does the decision of the Court of Appeals improperly extend the precedential scope of *Rust v. Sullivan*, 500 U.S. 173 (1991), in violation this Court's holdings in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995), and *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 541-43 (2001), that explicitly confine *Rust* to those settings where separate physical facilities are required to preserve the integrity of the government's own speech?

3. Does the decision of the Court of Appeals contravene this Court's unconstitutional conditions precedents because it upholds a massively burdensome restriction on privately funded speech without asking whether the burden furthers any legitimate government interest?

4. Is the decision of the Court of Appeals contrary to this Court's viewpoint discrimination jurisprudence because it fails to recognize that an inference of viewpoint discrimination is compelled by the discriminatory imposition of a massively burdensome speech restriction that is not justified by any legitimate government interest?

PARTIES INVOLVED

The entities that participated as parties before the Court of Appeals were:

Legal Services for New York City, South Brooklyn Legal Services, and Farmworker Legal Services of New York (Plaintiff-Appellee-Cross-Appellants)

Community Service Society of New York, Inc.; Centro Independiente de Trabajadores Agricolas; Peggy Earisman; Lauren Shapiro; Andrew Connick; and the New York Foundation (Plaintiff-Cross-Appellants)

Legal Services Corporation (Defendant-Appellant)

United States of America (Defendant-Intervenor-Appellant)

CORPORATE DISCLOSURE STATEMENT

Petitioner South Brooklyn Legal Services[1] is a constituent corporation, of which Petitioner Legal Services for New York City is the sole member. Apart from South Brooklyn Legal Services, no other Petitioners have parent corporations. No Petitioner issues stock. Accordingly, there are no publicly held companies holding 10% or more of their stock.

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1. When this litigation began, Petitioner's formal name was Brooklyn Legal Services Corporation B. Its current formal name is "South Brooklyn Legal Services."

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Legal Services for New York City, South Brooklyn Legal Services, and Farmworker Legal Services of New York respectfully petition for the issuance of a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit in this case.

CITATIONS OF RELEVANT OPINIONS

On December 21, 2004, the District Court entered an opinion granting Petitioners a preliminary injunction with respect to certain of their claims. *Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566 (E.D.N.Y. 2004), App. 47a. That opinion was modified in a Supplemental Memorandum and Order entered on February 24, 2005. *Velazquez v. Legal Servs. Corp.*, 356 F. Supp. 2d 267 (E.D.N.Y. 2005), App. 36a. On September 8, 2006, a panel of the Court of Appeals vacated the District Court's grant of injunctive relief and remanded the proceedings to the District Court. *Brooklyn Legal Servs. Corp. B v. Legal Servs. Corp.*, 462 F.3d 219 (2d Cir. 2006), App. 1a. On December 28, 2006, the Court of Appeals denied Petitioners' request for rehearing and rehearing en banc. *Brooklyn Legal Servs. Corp. B v. Legal Servs. Corp.*, No. 05-0340, Order (Dec. 28, 2006), App. 146a. The mandate was issued on January 3, 2007.

Earlier phases of this protracted litigation are reported at *Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323 (E.D.N.Y. 1997) (denying injunctive relief), *aff'd in part, rev'd in part*, 164 F.3d 757 (2d Cir. 1999), *aff'd in part*, 531 U.S. 533 (2001), *cert. denied in part*, 532 U.S. 903 (2001).

JURISDICTIONAL STATEMENT

The Circuit Court issued its judgment on September 8, 2006. Plaintiffs filed a timely petition for rehearing and rehearing *en banc* on September 29, 2006, which the Court of Appeals denied in an order filed on December 28, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions, statutes, and regulations are involved in this case:

1. United States Constitution, Amendment I
2. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, H.R. 3019 (April 26, 1996), App. 149a
3. Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009, H.R. 3610 (Sep. 30, 1996), App. 159a
4. Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998, Pub. L. 105-119, 111 Stat. 2440, H.R. 2267 (Nov. 26, 1997), App. 162a
5. Science, State, Justice, Commerce, & Related Agencies Approps. Act, 2006, Pub. L. 109-108, 119 Stat. 2290, H.R. 2862 (Nov. 22, 2005), App. 165a
6. Revised Continuing Appropriations Resolution, 2007, Pub. L. 110-5, H.J. Res. 20 (Feb. 15, 2007), App. 167a
7. 45 C.F.R. § 1610.8, App. 169a

STATEMENT OF THE CASE

For the past half century, the nation's legal services program, financed jointly by federal, state, local and private resources, has enabled independent, locally administered non-profit legal services organizations to represent low-income clients in civil legal matters involving basic human needs. This case raises important constitutional questions concerning the federal government's power to impose extremely burdensome conditions on the receipt of federal funds, which effectively deter federally funded legal services programs from using their substantial state, local and private funds to underwrite forms of legal representation that are routinely available to wealthier litigants, but that may not, under current law, be underwritten by federal funds.

Petitioners Legal Services for New York City (LSNY), South Brooklyn Legal Services, and Farmworker Legal Services of New York (FLSNY) are autonomous, locally managed civil legal services programs in the New York area. Each receives, or wishes to receive, funding from the Legal Services Corporation (LSC), an entity financed by Congress, whose Board of Directors is appointed by the President. Stipulated Facts ("SF") ¶ 18, 35, 69, App. 230a-231a, 233a, 239a. LSC's mission is to provide economic assistance to autonomous local legal services programs throughout the United States. For the current fiscal year, Congress has appropriated approximately $350 million to LSC. Revised Continuing Approps. Res., 2007, Pub. L. 110-5, H.J. Res. 20 (Feb. 15, 2007), App. 168a.

Each Petitioner also receives substantial financial support from state, local and private resources. LSNY, an umbrella entity that includes many of the legal

services programs operating in the City of New York, has a yearly budget of $32 million, of which approximately 60% derives from sources other than LSC. SF ¶ 19-20, App. 231a.

South Brooklyn Legal Services, a principal source of legal representation for indigent persons in Brooklyn, New York (whose population standing alone would make it the nation's fourth largest city), has a yearly budget of $4.3 million, with approximately 67% coming from sources other than LSC. SF ¶ 36, App. 233a-234a.

Petitioner FLSNY, a crucial source of legal representation for migrant farm labor in New York State, no longer receives funding from LSC, because FLSNY found it impossible to meet the specialized legal needs of the migrant farmworker population without providing forbidden legal services. As a result, FLSNY operates a diminished program funded solely by non-LSC sources. SF ¶ 74, 75, App. 240a.

The diverse mix of federal, state, local and private funding available to Petitioners is typical of LSC grantees. On a national basis, half of the nation's legal services program is funded from sources other than LSC funds. SF ¶ 2, App. 224a. It is, however, particularly intrusive in this case for the federal tail (constituting less than 40% of the total) to seek to wag the entire legal services dog by imposing a massive and completely unjustified deterrent on the unrestricted use of non-federal funds.

In 1996, as part of the annual LSC appropriations legislation, Congress prohibited LSC grantees from using legal services funds (from LSC or any other source) to pay for a laundry list of "restricted" legal services. Omnibus Consol. Rescissions & Approps. Act of 1996, Pub. L. 104-134, § 504, 110 Stat. 1321, H.R.

3019 (April 26, 1996), App. 149a-158a. Many of the restricted legal techniques, such as claiming court-awarded attorneys' fees in appropriate settings or representing clients in class action litigation, are routinely available to private litigants and play a significant role in the resolution of contemporary legal disputes.[2]

I. LSC'S Regulation Requiring Extensive Physical And Employee Separation

In response to Congress' absolute ban on the use by LSC grantees of funds from any source to provide "restricted" legal services to their indigent clients,[3] LSC initially imposed a clearly unconstitutional absolute prohibition on the use of state, local and private funds to provide the restricted services. *See Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323, 329 (E.D.N.Y. 1997), *aff'd in part, rev'd in part*, 164 F.3d 757 (2d Cir. 1999), *aff'd in part*, 531 U.S. 533 (2001). After realizing that such a *de jure* ban on the use of private funds could not survive constitutional scrutiny under *FCC v. League of Women Voters*, 468 U.S. 364 (1984), LSC hit upon an ingenious *de facto* alternative. Drawing on a regulation

2. The restrictions also bar representation of certain categories of clients, including many categories of immigrants legally in this country and possessing work authorization. The restrictions have been re-enacted in substantially identical form in each subsequent LSC appropriations statute. *See, e.g.*, Revised Continuing Approps. Res., 2007, Pub. L. 110-5, H.J. Res. 20 (Feb. 15, 2007), App. 167a; Science, State, Justice, Commerce, & Related Agencies Approps. Act, 2006, Pub. L. 109-108, 119 Stat. 2290, H.R. 2862 (Nov. 22, 2005), App. 165a.

3. The Congressional text unequivocally imposes the federal restrictions on state, local and private funds. Omnibus Consol. Rescissions & Approps. Act of 1996, Pub. L. 104-134, § 504, App. 149a-150a. Accordingly, Petitioners challenge LSC's statutory authority to impose anything other than a flat ban.

that had been upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991), LSC issued the so-called "Program Integrity" regulation at issue herein, which LSC interprets as requiring LSC grantees to establish and maintain wasteful and duplicative physically separate legal programs, staffed by separate personnel, as the price of using non-federal funds to offer restricted legal services. *See* 45 C.F.R. § 1610.8, App. 169a. As LSC intended, the massively burdensome regulation has operated – and currently operates – as a powerful deterrent to the use of state, local and private funds by LSC grantees to provide a full menu of legal services to their indigent clients.

Since LSC interprets its regulation as requiring its local grantees to establish and maintain hugely expensive physically separate premises staffed by separate personnel in order to use state, local and private funds to offer the "restricted" legal services that may not be underwritten by federal funds, Petitioners LSNY and South Brooklyn Legal Services have been unable to deploy their substantial non-federal resources to provide a full spectrum of legal representation for their indigent clients, because the annual cost of establishing such duplicative and redundant separate facilities staffed by separate personnel would be an irresponsible waste of extremely scarce resources.

The most significant deterrent imposed by the requirement of redundant and wasteful separate physical facilities and separate staffing is financial. All agree that legal services programs do not have nearly the resources needed to meet the legal needs of the nation's indigent population. *See* SF ¶ 14, App. 230a. Section 1610.8 exacerbates the problem of scarce resources by forcing Petitioners to choose between expending huge sums on duplicative, wasteful and

redundant facilities and staff as the price of offering a full menu of legal services to the poor, or accepting LSC's restrictions on the kinds of representation that can be offered. The uncontested record establishes that compliance with Section 1610.8 would cost Petitioners hundreds of thousands of dollars per year. For example, South Brooklyn Legal Services has determined that the cost of establishing the separate facility demanded by LSC would be at least $380,000 annually, draining it of the ability to accept 500 clients per year. *See* SF ¶ 41, App. 234a. *See also* SF ¶ 25, App. 232a (establishing a separate affiliate would cost LSNY member Queens Legal Services at least $200,000 per year); *id.* ¶ 63, 72, 73, 78, App. 238a, 240a, 241a (establishing a separate affiliate would cost petitioner FLSNY at least $130,000 in the first year and $80,000 in successive years, out of a total annual budget of approximately $500,000). Since Petitioners already lack the resources to meet the demand for their services, diverting already scarce resources to wasteful and duplicative facilities would impose a serious human toll.

The requirement of separate facilities and separate staffing imposes severe programmatic costs, as well. By forcing legal services programs to segregate lawyers based on the nature of the legal service they offer, the regulation impedes the free flow of information and ideas between and among lawyers, to the detriment of both the clients they represent, and the education and development of the lawyers themselves. *See* Scherer Decl. ¶ 15-18, App. 240a-252a; Gray Decl. ¶ 12-13, App. 262a. No responsible legal services manager would force young lawyers engaged in the extremely difficult task of providing low income clients with effective legal representation to practice law in physical and intellectual isolation from one another.

Finally, the requirement of maintaining duplicative, redundant and overlapping legal programs poses an administrative nightmare, requiring the shuttling of unsophisticated clients between physically separate offices, causing many to abandon representation, and hampering the programs' ability to service the rest. *See* Schmidt Decl. ¶ 18-20, App. 272a. Moreover, administrators must allocate clients, lawyers and cases between the programs, often at an early stage of the representation before the appropriate level of services can be determined. *See* Gray Decl. ¶ 12, App. 262a.

Not surprisingly, in the decade that Section 1610.8 has been in effect, virtually every responsible local legal services organization in the country has found it irresponsibly burdensome to waste desperately needed scarce resources on establishing and maintaining duplicative, wasteful and redundant separate legal programs. SF ¶ 11, 12, App. 226a-229a.

To be sure, Section 1610.8 does not literally require physical separation of entire offices and staff (the regulation's text insists merely on legal separation, "physical and financial separation" and "separate personnel"). Unfortunately, however, LSC, has construed the regulation to require duplicative physically separate offices and separate staffing. For example, in 2003, at the suggestion of the District Court and in an effort to comply with Section 1610.8 without wasting huge sums on physically separate offices and staff, Petitioners submitted a configuration proposal (the "Proposal") to LSC.[4] The Proposal was based upon the analogous separation requirements imposed on religious grantees by the President's Faith-Based

4. The initial proposal is in the Appendix at A-171a, and a subsequent, clarified version is at A-178a.

Initiative to ensure that government neither subsidizes nor endorses the religious work of the religious grantees in violation of the Establishment Clause.[5] Tracking the provisions of the Faith-Based Initiative, Petitioners offered to establish legally separate affiliates that would: 1) comply with generally accepted accounting principles; 2) comply with LSC requirements forbidding the use of LSC funds to subsidize direct and indirect costs of the separate program, such as salaries, overhead, and utilities; 3) conduct non-LSC-funded activities in a different room, or at a different time, than LSC-funded legal services; 4) maintain strict legal separation between the two entities, using easily distinguishable names for each program; 5) implement a system to monitor staff time to ensure that LSC funding is spent solely on LSC-approved cases; and 6) display extensive signage and provide written and oral disclaimers to the community at large, and to all persons having business with the grantee or the affiliate, differentiating the LSC grantee from the non-LSC-funded affiliate. *See* Clarified Configuration Proposal, at 1-5, App. 178a-181a.

LSC recognized, as it must, that the safeguards contained in the Proposal: 1) adequately provided that LSC funds could not be diverted to unauthorized uses; and 2) adequately alleviated the concern that the public would misunderstand the scope of LSC funding. *See* LSC, External Op. No. EX-2003-1008 (May 8, 2003), App. 193a-194a; LSC, External Op. No. EX-2003-1009 (June 24, 2003), App. 211a, 214a, 215a. LSC, nevertheless, rejected the Proposal as inadequate because it did not provide for adequate physical and personnel separation. LSC, External Op. No. EX-2003-1009, App. 216a-221a. When asked by the District

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5. The Faith-Based Initiative is described *infra* at 24.

Court why more extensive physical and personnel separation was needed, since the Proposal dealt fully with the cross-subsidization and community confusion issues, LSC answered tautologically – saying it was needed because physically separate facilities and staffing are required by the regulation.

II. The History Of This Litigation

This litigation has a long and protracted history. In 1997, the District Court, which has jurisdiction over this litigation pursuant to 28 U.S.C. § 1331, rejected a facial challenge to the newly imposed Congressional and LSC restrictions. *Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323 (E.D.N.Y. 1997). On appeal, the Second Circuit struck down the ban on using federal funds to challenge the constitutionality of certain statutes. *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 769-72 (2d Cir. 1999). The Second Circuit also affirmed the rejection of plaintiffs' facial challenge to 45 C.F.R. § 1610.8, but invited the parties to bring an as-applied challenge if compliance with LSC's regulations proved "unduly burdensome." *Id.* at 767. This Court affirmed the Circuit's invalidation of the ban on constitutional challenges, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001), and denied certiorari in connection with the facial challenge to the remaining regulations. *Velazquez v. Legal Servs. Corp.*, 532 U.S. 903 (2001).

On remand, Petitioners accepted the Second Circuit's invitation to mount an individualized, as-applied challenge to the "unduly burdensome" nature of LSC's requirement of a separately staffed, separate physical facility. The able District Court[6] carefully

6. The *ad hominem* nature of the opinion of the Second Circuit panel denigrating the conscientious efforts of the District Court to comply with the Circuit's first *Velazquez* (Cont'd)

compiled an uncontested record of the costs and burdens of compliance, together with an assessment of the government's asserted justifications, including numerous sworn declarations detailing and quantifying the onerous financial, programmatic, and administrative burdens compliance with Section 1610.8 would impose on Petitioners' programs.

LSC initially declined to submit material discussing the regulation's specific requirements, insisting that Petitioners present a formal application to reconfigure their operations to comply with Section 1610.8. After Petitioners submitted the Proposal (discussed above), LSC rejected the Proposal because it failed to provide for physical or personnel separation. *See* discussion *supra* at 8-9. Neither LSC, nor the United States as intervenor, made any effort to challenge Petitioners' sworn declarations detailing the severe burdens imposed by Section 1610.8. Rather, the parties entered into an undisputed factual stipulation reflecting the facts sworn to in Petitioners' declarations. *See* Stipulated Facts, App. 222a.

Hewing closely to the Second Circuit's first opinion in *Velazquez*, and to the Stipulated Facts, the District Court concluded that Section 1610.8, as applied to Petitioners, imposed an undue burden on protected expression that could not be justified by the proffered governmental interests in controlling the use or apparent use of federal funds. *Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566, 598-613 (E.D.N.Y. 2004),

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(Cont'd)
opinion and this Court's unconstitutional conditions precedents is particularly troubling. *e.g.*, *Velazquez*, 462 F.3d at 221, App. 2a. Further proceedings in the District Court would merely unnecessarily prolong this already protracted litigation since the trial court has already made the needed factual findings.

App. 112a-144a. The District Court concluded that since Petitioners had offered to operate in a manner that satisfied all legitimate government interests, LSC's insistence on an unjustifiably burdensome requirement of a physically separate setting staffed with separate personnel violated Petitioners' First Amendment right to use unrestricted state, local and private funds to provide a full spectrum of legal services to the poor. *Id.*

A new panel of the Second Circuit (which did not contain a member of the original panel) reversed. *Brooklyn Legal Servs. Corp. B v. Legal Servs. Corp.*, 462 F.3d 219, 229-33 (2d Cir. 2006), App. 18a-27a. The new panel held that the District Court had erred in even considering whether the regulations imposed unjustified and undue burdens on Petitioners' ability to engage in free expression with non-LSC funds. *Id.* at 231. Ignoring the limitation placed on *Rust v. Sullivan* by this Court in *Velazquez*, the panel erroneously relied on *Rust*, and seriously misapplied the unconstitutional conditions doctrine. *Id.* at 228-29, 231, App. 18a, 22a-23a. The panel reasoned that so long as a theoretical option existed to establish a physically separate facility, LSC was not required to justify the extremely burdensome requirement, despite the undisputed record evidence that the costs associated with establishing a physically separate facility imposed a massive deterrent – if not an outright prohibition – on the unrestricted use of state, local and private funds. *Id.* at 231, App. 23a-24a. After a petition for rehearing was denied, App. 146a, this timely petition for certiorari was filed.

With respect, the Circuit Court opinion below, which licenses the government to utilize funding restrictions to deter privately funded speech without any justification whatever, so long as there is no

absolute prohibition, cannot be squared with the unconstitutional conditions doctrine, or with the First Amendment. The First Amendment prohibits unjustified massive governmental *deterrence* of protected speech, not merely its outright *prohibition*.

REASONS FOR GRANTING THE PETITION

This case warrants review by this Court for multiple reasons. First, the restrictions at issue herein severely impede the ability of more than one hundred legal programs across the United States to use their state, local and private funds to provide legal services to the poor that are essential to the proper functioning of our justice system. *See generally Velazquez*, 531 U.S. 533. *See also* LSC Act, 42 U.S.C. § 2996(3). As this Court has noted, for many low-income individuals, often there is often no source of legal representation free of the restrictions. *Velazquez*, 531 U.S. at 546. The restrictions impact the representation of more than one million indigent clients each year. *Velazquez*, 164 F.3d at 759. The restrictions dramatically burden the freedom to use approximately $300 million in state, local and private funds each year to engage in constitutionally protected activity. SF ¶ 1, App. 224a. The result is that millions of low-income clients are deprived of the full range of legal representation despite the willingness of non-federal funders to pay for it, to the detriment of the quality of justice delivered by the nation's judicial system.

Second, the restrictions at issue herein threaten the viability and proper operation of newly emerging cooperative ventures between the public and private sectors, and between the state and federal governments. The opinion of Court of Appeals leaves the federal government free to impose massive, unjustified burdens on the ability of its partners to use their own funds to

engage in constitutionally protected speech. Unless the opinion is reviewed, state, local and private entities will be reluctant to enter into such partnerships where the price is the potential loss of First Amendment freedoms. Indeed, the restrictions already have already eroded private support for the legal services program.

Third, unless the opinion is reviewed, the federal government's power to use funding conditions to censor disfavored speech will be dramatically enhanced, a particularly dangerous result in a setting like the legal services program, where the government-funded speech is designed to be critical of the government. *See Velazquez*, 531 U.S. at 548-49.

Fourth, the opinion of the Court of Appeals is contrary to the recent opinion of this Court in *United States v. American Library Association*, 539 U.S. 194 (2003), in particular; and to this Court's unconstitutional conditions jurisprudence, in general. In *American Library Association*, this Court made clear that government must justify funding conditions that impose a substantial deterrent on privately funded speech. Despite this unequivocal requirement, the Court of Appeals ruled that no justification was required for LSC's insistence upon separate physical facilities, even though the requirement imposes a massive burden on non-federally funded First Amendment activity, because the burden merely deterred, but did not necessarily prohibit, the non-federally funded speech. *See* discussion *infra* § I.A.

Fifth, the opinion of the Court of Appeals dramatically expands the reach of this Court's holding in *Rust v. Sullivan*, in direct defiance of this Court's prior opinions. In *Rust*, the Court upheld a requirement that federally-funded doctors employed in a family-planning program refrain from discussing abortion with

their patients, unless the privately-funded discussion took place in a privately-funded separate physical facility. 500 U.S. at 196-98. In both *Velazquez*, 531 U.S. at 541-43, and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995), this Court held that the requirement of a separate physical setting in *Rust* was justified only because it was necessary to avoid garbling the government message delivered by the government-funded doctor. In the context of legal services, however, this Court has held unequivocally that the program is not designed to convey a governmental message. Rather, it is designed to fund private speech, often in opposition to the government. *Velazquez*, 531 U.S. at 541. Accordingly, there is no government message to garble. Thus, in this case, the government's only legitimate interests in imposing funding restrictions affecting non-federal funds are: 1) avoiding subsidization of unauthorized activities; and 2) avoiding confusion over who funds what activities. Since LSC concedes that those interests are fully satisfied by Petitioners' Proposal, no basis exists to insist on additional restrictions that massively deter First Amendment activity for no legitimate reason. *See* discussion *infra* § I.B.

I. The Court Of Appeals Erred By Failing To Require LSC To Offer Any Justification For Imposing A Massive Burden On Privately Funded Speech.

It is a basic principle of this Court's First Amendment jurisprudence that government cannot burden speech without any legitimate reason for doing so. *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 168 (2002). This principle applies even when the speech restriction takes the form of a condition on the receipt of federal funds. *League of Women Voters*, 468 U.S. at 398-99. Yet, the court below, confronted by

an unchallenged record that quantified the extremely burdensome nature of LSC's restrictions and demonstrated the lack of any justification for them, ruled that LSC may deter privately funded speech by imposing unjustified and burdensome costs on its exercise merely because: 1) the burden is couched, not as a direct restriction, but as a condition on the receipt of federal funds; and 2) the burden functions as a powerful deterrent, but not necessarily as an outright prohibition. *Velazquez*, 462 F.3d at 229-33, App. 18a-27a. In doing so, the Court of Appeals decision incorrectly harks back to an outmoded tradition of requiring the recipients of government funds to "take the bitter with the sweet," even if the "bitter" results in the unjustified deterrence of privately funded speech.

A. The Court of Appeals' Decision Contravenes *United States v. American Library Association* and This Court's Other Unconstitutional Conditions Precedents.

Over the last fifty years, this Court has repeatedly rejected the notion that merely because a restriction on speech is couched as a condition on funding, it is virtually immune from First Amendment scrutiny. *See Velazquez*, 531 U.S. at 544; *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958). *See also Rumsfeld v. Forum for Acad. & Inst'l Rights*, 547 U.S. 47, 126 S. Ct. 1297, 1307 (2006) (reaffirming that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit") (internal citations and quotation marks omitted).

Instead, the Court has grappled with the task of forging an "unconstitutional conditions" doctrine that

limits the government's power to use federal funding as a lever for censorship, while recognizing that the funding process generates two important governmental interests that are not present in the context of direct regulation: 1) enforcing substantive limits on the uses to which federal funds may be put, and 2) assuring the effective use of the government funds. *See Rosenberger*, 515 U.S. at 833-35; *Rust*, 500 U.S. at 196.

In forging this doctrine, the Court has consistently drawn a bright line between government's power to insist that funding recipients respect limits on the use of federal funds, and government's power to control a grantee's private expression paid for by its own separately raised funds. While government has substantial power over the former so long as the "funding decision [is not] aimed at the suppression of ideas thought inimical to the Government's own interest," *Velazquez*, 531 U.S. at 549, its power over privately funded speech is strictly limited. Indeed, while this Court has upheld insubstantial burdens on grantees' privately funded speech when necessary to assure that federal funds were not diverted to unauthorized uses, this Court has never upheld a funding restriction imposing a substantial burden on the grantee's ability to use private funds to engage in First Amendment activities outside the government speech context deemed present in *Rust v. Sullivan*.

For example, in *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983), this Court upheld the denial of tax exempt status to non-profit corporations that engaged in substantial lobbying, reasoning that Congress is free to elect not to subsidize lobbying. *Id.* at 545-56. Crucial to the Court's decision was the ease with which a "subsidized" speaker could

establish an affiliate organization free to use private funds to engage in the full range of First Amendment activities. *Id.* at 544 & n.6. In fact, the concurring Justices were explicit that if formation of the unrestricted affiliate were unduly burdensome, the statute would be unconstitutional. *Id.* at 553-54 (Blackmun, J., concurring).

Regan's logic was confirmed one term later in *FCC v. League of Women Voters*, invalidating a federal statute forbidding television stations receiving federal funding under the Public Broadcasting Act from using private funds to editorialize. The Court explicitly rejected an effort to defend the ban on editorializing as a permissible restriction on the use of federal funds, reasoning that the statute prohibited both subsidized and private speech. The Court concluded that the government had failed to demonstrate a need for "barr[ing a station] from using even wholly private funds to finance its editorial activity." 468 U.S. at 400. As in *Regan*, the *League of Women Voters* Court noted that a non-burdensome requirement of establishing a separate entity "which could then use the station's facilities to editorialize with nonfederal funds" would not violate the First Amendment. *Id.* It is clear, though, that a government regulation that required a separate transmitter in a separate physical space staffed by separate personnel would have imposed an undue – and therefore, unconstitutional – burden on privately funded speech.

The Court's more recent cases have hewed to the same line. In *United States v. American Library Association*, the Court rejected a facial challenge to a statute that conditioned federal funding of public libraries on a requirement that Internet filters be installed on non-federally funded library computers.

The Court[7] treated as dispositive the minimal burden the statute imposed – a simple request by an adult patron was sufficient to disable the filters. 539 U.S. at 208-09 (plurality op.); *id.* at 214 (Kennedy, J., concurring) ("If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case."); *id.* at 220 (Breyer, J., concurring) (rejecting facial challenge because of the "comparatively small burden" imposed). However, the concurring Justices made clear that a plaintiff would be entitled to an as-applied First Amendment exemption on a showing either that, in specific localities, it was unduly burdensome to unblock websites or disable filters, or that "an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way. . . ." *Id.* at 215 (Kennedy, J., concurring); *id.* at 219-20 (Breyer, J., concurring). The *American Library Association* concurrences also made clear that government interests must be weighed in the balance. *Id.* at 215 (Kennedy, J., concurring) ("There are, of course, substantial Government interests at stake here. . . . Given this interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face."); *id.* at 217 (Breyer, J., concurring) (examining whether "speech-related harm is potentially justified by unusually strong governmental interests"). Despite such clear guidance, the Court of Appeals below simply refused to weigh the massive burden on speech imposed by the requirement of physically separate facilities

7. In the absence of a majority opinion in *American Library Association*, Justice Kennedy's concurring opinion is controlling because it was decided on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

against the proffered governmental interests, and ridiculed the District Court's thoughtful attempt to do so.

Under the unconstitutional conditions doctrine as set forth in *American Library Association* and its predecessors, conditioning the receipt of federal funds on a requirement that a library establish and maintain a separate building staffed by separate personnel to house privately purchased books that could not be bought with federal funds would unquestionably violate the First Amendment. LSC's version of such a regulation – conditioning the receipt of federal funds on a requirement that a legal services program establish and maintain separate physical facilities staffed with separate personnel to house privately funded lawyer-client speech that cannot be underwritten by federal funds – is equally unconstitutional.

B. The Court of Appeals Decision Below Contravenes *Legal Services Corporation v. Velazquez* and *Rosenberger v. Rector and Visitors of the University of Virginia* by extending *Rust v. Sullivan* to Settings Where the Government Funds Private, Not Government, Speech.

The only decision of this Court to uphold a funding condition imposing a substantial burden on a grantee's ability to use private funds to speak freely is *Rust v. Sullivan*. The *Rust* Court upheld a requirement of separate physical facilities when federally funded doctors use private funds to raise the taboo subject of abortion with a patient. 500 U.S. at 196-98. As this Court's subsequent decisions in *Velazquez* and *Rosenberger v. Rector and Visitors of the University of Virginia* make clear, the federally subsidized doctors

in *Rust* were deemed paid agents employed to deliver a government-approved message concerning acceptable methods of family planning. The Court found that were the doctors free to use private funds to deliver a different message on the same premises, the government's message might be undercut or overridden. *See Velazquez*, 533 U.S. at 541-43; *Rosenberger*, 515 U.S. at 833 (referring specifically to the section of the *Rust* opinion upholding the physical separation requirement).

The *Velazquez* Court explicitly warned that *Rust* was inapplicable to the legal services program, which was designed to empower private lawyers to deliver a client's message (often in opposition to the government's message), and not to employ the subsidized lawyers as the government's mouthpiece. 533 U.S. at 541-42. The panel below dismissed this holding as irrelevant, stating that this Court's *Velazquez* opinion "was a review of a part of [the Circuit's earlier *Velazquez*] judgment entirely unrelated" to the Circuit's discussion of the physical separation requirement. 462 F.3d at 228, App. 18a. In direct defiance of *Velazquez* and *Rosenberger*, the court below read *Rust* to permit government to require that disfavored, privately funded speech be physically separated from government-subsidized speech even where, as here, government is subsidizing private speakers to oppose the government. *Id.* at 231, App. 23a. Accordingly, the Court of Appeals opinion dramatically extends *Rust*'s holding far beyond the narrow setting contemplated by this Court.

Stripped of *Rust*'s protective cloak, the decision below offers no justification for the immense burdens the LSC regulation imposes. Nor could it. Where, as here, the federal government elects to fund autonomous private speakers to function as advocates for the poor,

as opposed to funding speakers to deliver a government message, there is simply no government message to garble. There is, consequently, no legitimate interest in forcing a grantee to establish and maintain redundant and wasteful physically separate offices and staff. In this case, the legitimate interests asserted by LSC are confined to: 1) avoiding subsidization of unauthorized activities, and 2) avoiding confusion over who funds what activities. *Velazquez*, 349 F. Supp. 2d at 607, App. 130a-131a. As LSC concedes, maintaining legally separate entities and careful record-keeping is sufficient to prevent the unauthorized use of federal funds. Clarified Configuration Proposal, App. 211a-212a. Likewise, LSC agrees that effective notice and disclaimers are sufficient to notify the community about which programs are federally funded and which are not. *Id.*, App. 214a-215a.

LSC's concession that compliance with Petitioners' configuration proposal would satisfy LSC's concerns over cross-subsidization and community confusion was compelled by this Court's precedents. In *League of Women Voters*, the Court explicitly rejected the notion that Congress could require broadcasting stations to editorialize in physically separate facilities to prevent confusion over the scope of federal funding. To the extent that permitting editorializing through an affiliate using the same transmitting facilities on the same physical premises might mislead listeners into thinking that editorials reflected the views of the federal government, the answer, held the Court, was not to bar privately funded editorializing by the funded station, but to insist on disclaimers: "Congress could simply require . . . stations to broadcast a disclaimer every time they editorialize. . . . Such a disclaimer . . . would effectively and directly communicate to the audience that the editorial reflected only the views of

the station rather than those of the Government." 468 U.S. at 395. *See also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (rejecting argument that speakers could be denied right to speak in owner's shopping mall on the theory that listeners might think mall owner approved the speech, because "signs . . . could disclaim any sponsorship of the message").

Likewise, while the Court's Establishment Clause cases acknowledge a constitutional imperative to ensure that government neither funds nor appears to endorse religion, the cases do not require prophylactic physical separation between government-funded activities and privately funded religious activities. Rather, they permit religious groups to receive government funding so long as the money is allocated on neutral terms and devoted to secular purposes, *see Mitchell v. Helms*, 530 U.S. 793, 809-825, 829-32 (2000) (plurality op.) (permitting loans of secular educational materials to religious schools); *id.* at 840-41 (O'Connor, J., concurring) (emphasizing that secular aid cannot be diverted to indoctrination), and so long as careful bookkeeping and signage are in place. *See Capitol Sq. Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 769 (1995) (plurality op.) ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such."); *id.* at 776 (O'Connor, J., concurring) (finding "presence of a sign disclaiming government sponsorship or endorsement of the Klan cross" ensured that there was no impermissible endorsement). A requirement of physical separation is no more justified here than in the Establishment Clause context.

Not surprisingly, when government is not seeking to deter disfavored privately funded speech, it does not require physical separation as the price of using private

funds. For example, under the President's Faith-Based Initiative, which subsidizes faith-based groups to provide social services, faith-based grantees must comply with general principles of accounting and conduct their privately funded religious activities in a different room, or at a different time, from their federally funded activities. *See, e.g.*, 24 C.F.R. § 92.257(b), (d) (governing receipt of federal housing funds); 28 C.F.R. § 38.1(b), (c) (governing receipt of Department of Justice funds). There is, however, no requirement that faith-based groups establish wasteful and duplicative separate physical premises or hire separate staff. *Id.* In fact, federal agencies have specifically rejected a physical separation requirement as an "unnecessarily harsh burden" on their faith-based grantees. *See, e.g.*, 69 Fed. Reg. 2832-01, 2834 to 2835 (Jan. 21, 2004) (Department of Justice); 68 Fed. Reg. 56,396, 56,400 (Sept. 30, 2003) (Department of Housing and Urban Development).

Nevertheless, when Petitioners presented LSC with a configuration proposal closely modeled on the Faith-Based Initiative, the Proposal was rejected. *See* discussion *supra* at 8-10. Such blatantly inconsistent treatment, keyed to whether or not the government seeks to deter the privately funded speech at issue, undermines any claim that the regulation's physical separation and separate staffing requirements further legitimate governmental interests. *See Republican Party v. White*, 536 U.S. 765, 779-80 (2002); *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994). Indeed, it compels an inference that the federal government is engaged in an exercise in viewpoint discrimination. *See* discussion *infra* section II.

C. The Court of Appeals Erred in Its Application of the Adequate Alternative Channels Test.

In place of the exacting means-ends scrutiny this Court requires when a regulation imposes content-based restrictions on private speech (even in the context of a federal funding program), the Circuit Court opinion substituted an "adequate channels of communication" analysis, vacating the preliminary injunction because of the District Court's failure to apply that test. *Brooklyn Legal Servs. Corp. B*, 462 F.3d at 231-33, App. 23a-27a. According to the panel's opinion, the government has no duty to justify its burdensome deterrence of privately funded speech until Petitioners establish that Section 1610.8 is not merely massively burdensome, but operates as an outright prohibition. *Id.* In applying such an unprecedented test, the panel made two fundamental mistakes.

First, the panel misconstrued the notion of an adequate alternative channel of communication. The panel appeared to believe that an "alternative" channel of communication is "adequate" as long as it is not physically foreclosed. *Id.* at 233, App. 27a (ordering the District Court on remand to make findings about whether burdens "preclude the plaintiffs from establishing an affiliate"). However, no alternative channel of communication can be deemed "adequate" when the cost of invoking it imposes a massive, utterly unjustified burden on the speaker. In *Regan*, for example, the Court held that the creation of a 501(c)(4) organization provided an adequate alternative channel for non-profit organizations to engage in lobbying because the only separation required – separate incorporation and bookkeeping – was "not unduly burdensome." 461 U.S. at 544 & n.6.

Second, the panel overlooked numerous decisions of this Court, which uniformly have held that a content-based regulation of private speech cannot be justified merely because it leaves open alternative channels of communication. *See Reno v. ACLU*, 521 U.S. 844, 879-880 (1997); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 535-36 (1980); *see also Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 809 (1996) (Kennedy, J., concurring in part and dissenting in part).

Where, as here, a statute imposes severe burdens on speech based on content, it is particularly important that the reviewing court scrutinize the government's proffered justifications to "ensure that communication has not been prohibited [or massively deterred] 'merely because public officials disapprove the speaker's views.'" *Consolidated Edison*, 447 U.S. at 536 (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)).

II. The Lack Of A Legitimate Justification For The Requirement Of Physical Separation Compels An Inference That The Requirement Is Designed To Deter Disfavored Speech.

As discussed above, LSC's physical separation requirement is unsupported by a legitimate government interest. Although LSC has legitimate interests in assuring non-subsidization of unauthorized speech, and preventing confusion over endorsement of privately funded speech, a prophylactic physical separation requirement is nothing short of overkill, akin to "burn[ing] the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Indeed, the requirement is so out of proportion with the government's legitimate interests, and so much more burdensome than analogous measures the government

has used to satisfy those interests in the faith-based context and elsewhere, that an inference unmistakably arises that the government has imposed massive, unnecessary burdens in order deter speech with which it disagrees. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538-39 (1993).[8]

If Congress had sought to deter privately funded speech by imposing an unjustified and burdensome fee for its exercise, the statute unquestionably would violate the First Amendment. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 137 (1992) (citing *Murdock v. Pa.*, 319 U.S. 105 (1943)). The fact that the burdened speakers retained an option to pay the fee as the cost of "free" speech would not save the unjustified fee, because the First Amendment bans unjustified deterrence, not only outright prohibition. Moreover, if, as here, the fee was increased to the point where almost no one could afford to pay it, the unconstitutional desire to deter constitutionally protected expression would become more and more apparent.

Funding restrictions may not be used to carry out such a viewpoint-based exercise in censorship. In *Velazquez*, this Court invalidated a ban on using LSC funds to challenge the constitutionality of certain statutes. The Court held that since the legal services program is designed to underwrite the speech of private lawyers (often in opposition to the government), the government may not impose viewpoint-based funding restrictions on the ability of a legal services lawyer to

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8. The court below recognized that it was appropriate to consider whether LSC's regulations were supported by legitimate state interests for this very reason, *see Brooklyn Legal Servs. Corp. B*, 462 F.3d at 230, App. 21a, but inexplicably never made the additional step of conducting the analysis it prescribed.

provide the courts with the untrammeled flow of adversary speech needed for the proper operation of the judicial process, even when the government pays for the lawyer. 531 U.S. at 548-49.

This case is easier than *Velazquez*, but equally important. Ignoring this Court's precedents, the court below held that even in the absence of a legitimate interest, government may impose massively burdensome conditions on federal funding in a, thus far, successful effort to deter its private partners from using their *non-federal* funds to engage in forms of legal representation disfavored by the federal government, but crucial to the proper operation of the nation's justice system. This Court should grant certiorari to review – and reverse – the opinion below authorizing such classic, unconstitutional viewpoint discrimination.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be granted. Where, as here, a Circuit Court opinion seriously misapplies this Court's unconstitutional conditions jurisprudence in a manner that imposes massive, unjustified costs on non-profit legal services programs and allows government to use its public-private partnerships to silence potential critics, the opinion clearly warrants review by this Court.

Respectfully submitted,

PETER M. FISHBEIN
JOSEPH M. DRAYTON
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

BURT NEUBORNE
Counsel of Record
LAURA K. ABEL
DAVID S. UDELL
REBEKAH DILLER
DAVID H. GANS
BRENNAN CENTER FOR JUSTICE
AT NYU LAW SCHOOL
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6737

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED SEPTEMBER 8, 2006

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Nos. 05-0340-cv (L), 05-0360-cv (CON), 05-0787-cv (CON), 05-0792-cv (CON), 05-0925-cv (XAP)

BROOKLYN LEGAL SERVICES CORP. B and Legal Services for New York City, on their own behalf and on behalf of their clients, *et al.*,

Plaintiff-Appellee-Cross-Appellants,

Community Service Society of New York, Inc., *et al.*,

Plaintiff-Cross-Appellants,

Carmen Velazquez, *et al.*,

Plaintiffs,

v.

LEGAL SERVICES CORPORATION,

Defendant-Appellant-Cross-Appellee,

United States of America,

Intervenor-Defendant-Appellant-Cross-Appellee.

Argued Nov. 2, 2005.
Decided Sept. 8, 2006.

Appendix A

Before CARDAMONE, McLAUGHLIN, and B.D. PARKER, Circuit Judges.

CARDAMONE, Circuit Judge.

When one of the cases of this consolidated appeal was before us seven years ago, we set out some guidance on the law, which the district court either misinterpreted or missed. If the latter, such forgetfulness is understandable because we know that even Homer nodded.[1]

We have before us an appeal and several cross-appeals from a preliminary injunction entered in the United States District Court for the Eastern District of New York (Block, J.) on December 21, 2004, and from an order modifying it entered on February 24, 2005. The appeals concern the constitutionality of federal restrictions on local legal assistance programs that receive federal funding through the Legal Services Corporation (LSC). The restrictions apply regardless of whether the recipients receive non-federal funds in addition to LSC funds, and prohibit recipients from, *inter alia*, participating in class action suits, seeking attorneys' fees, and personally soliciting clients.

Plaintiffs South Brooklyn Legal Services Corp. *et al.* include local legal assistance programs which provide legal services to low-income New Yorkers, as well as the programs'

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1. A reference to the reappearance in Homer 's famous "Iliad" and "Odyssey" of a character that the author had earlier in this lengthy Greek saga killed-off. This prompted the Roman poet Horace to write "quandoque bonus dormitat Homerus" (even the noble Homer sometimes nods). Horace, *Ars Poetica*, l.359.

staff attorneys, clients, and donors. Defendant LSC is a federally-chartered nonprofit corporation that awards federal funds appropriated by Congress to recipient legal assistance programs. Congress has charged LSC with ensuring that the federal funds it distributes are not diverted by recipients toward activities Congress specifically desired not to subsidize. The United States has joined LSC as intervenor-defendant in these proceedings to defend the federal statute and regulation challenged by plaintiffs.

In the district court, plaintiffs sought a preliminary injunction against defendant LSC to prevent enforcement of portions of LSC's program integrity regulation, 45 C.F.R. § 1610.8, and § 504 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (1996 Act), Pub.L. No. 104-134, 110 Stat. 1321 (1996). In partially granting injunctive relief the district court reasoned that the administrative and financial costs imposed on plaintiffs by LSC's application of the regulation created an undue burden on plaintiffs' right under the First Amendment to use non-federal funds to engage in constitutionally protected activity.

BACKGROUND

I Statutory Background—the Program Integrity Regulation

LSC is a federally-chartered nonprofit corporation created and funded by Congress to serve as a conduit for federal funds that are distributed to local legal assistance programs. 42 U.S.C. § 2996b(a); *see* Legal Services Corporation Act of 1974 (LSC Act), Pub.L. No. 93-355, 88 Stat. 378 (1974) (codified as amended at 42 U.S.C. §§ 2996-

2996l). These recipient programs, like the ones included as plaintiffs to the present appeal, often receive funds from state and local governments and private sources in addition to funds received from Congress through LSC. *See* S.Rep. No. 104-392, at 2-3 (1996).

In 1996, facing mounting pressure to curtail some of the more controversial activities conducted by some recipient programs, *see id.* at 1-2, Congress enacted § 504 of the 1996 Act, which supplemented, and in some instances reinforced, the restrictions on LSC-fund recipients with more stringent requirements. *See also* Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub.L. No. 109-108, tit. V, 119 Stat. 2290, 2331 (2005) (carrying forward restrictions to the present time). For example, three of the 1996 Act restrictions, which also happen to be challenged by plaintiffs in their cross-appeals, prohibit recipients from participating in class action lawsuits, seeking certain types of attorneys' fees, and in-person solicitation of clients. 1996 Act § 504(a)(7), (13), & (18); *see* 45 C.F.R. pts. 1617, 1638, & 1642.

Shortly following the 1996 Act's enactment, a district court in Hawaii enjoined LSC from enforcing the 1996 Act's restrictions "to the extent that they relate to the use of Non-LSC Funds." *Legal Aid Soc'y of Haw. v. Legal Servs. Corp. (LASH)*, 961 F.Supp. 1402, 1422 (D.Haw.1997). The restrictions, as noted above, apply to LSC-fund recipients regardless of whether they also receive non-federal funds. The district court reasoned that because LSC, in implementing the 1996 Act's restrictions, had effectively foreclosed all avenues by which a recipient program could

use *non-federal* funds to engage in constitutionally protected activities, the federal corporation had imposed an unconstitutional condition on the receipt of a federal subsidy. *See id.* at 1414-17.

To address the District of Hawaii's injunction, LSC promulgated the program integrity regulation. *See* Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 62 Fed.Reg. 27,695, 27,697 (May 21, 1997) (codified at 45 C.F.R. § 1610.8). The new regulation created an avenue by which a recipient may "affiliate" with an organization that uses non-federal funds to engage in activities restricted by the 1996 Act, and was thus an attempt to cure any constitutional concerns raised by the *LASH* decision. *Id.*

Under the regulation, a recipient's relationship with an unrestricted affiliate organization is permissible, provided the recipient maintains "objective integrity and independence from [the] organization that engages in restricted activities." 45 C.F.R. § 1610.8(a). Objective integrity is achieved where the recipient (1) is a legally separate entity from the unrestricted affiliate organization, (2) refrains from transferring LSC funds to the unrestricted affiliate organization, and (3) maintains "sufficient physical and financial separation" from the unrestricted affiliate organization. *Id.* A recipient uncertain about whether its relationship with a restricted organization satisfies the regulation may "submit [to LSC] all the relevant 'program integrity' information and request a review by [LSC] of any existing or contemplated relationship with an organization that engages in restricted activities." *See* 62 Fed.Reg. at 27,698.

Appendix A

Determined to insulate the new rule from challenges such as those the District of Hawaii found persuasive, LSC designed the regulation to mirror another such program integrity regulation that had already survived similar constitutional challenges in the Supreme Court in *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). The endeavor was largely successful, for LSC's regulation has been upheld by every court to have encountered a challenge to its validity-including this one and the initially dubious district court in Hawaii. *See Velazquez v. Legal Servs. Corp. (Velazquez II)*, 164 F.3d 757, 773 (2d Cir.1999), *aff'g in relevant part*, 985 F.Supp. 323 (E.D.N.Y.1997); *Legal Aid Soc'y of Haw. v. Legal Servs. Corp.*, 145 F.3d 1017, 1031 (9th Cir.1998), *aff'g in relevant part*, 981 F.Supp. 1288 (D.Haw.1997).

II Prior Proceedings

A. *Velazquez I*

In 1997, several of the plaintiffs to this appeal, the so-called *Velazquez* plaintiffs, brought challenges on First Amendment grounds to the program integrity regulation and to certain of the 1996 Act's restrictions relating to a recipient's lobbying and welfare reform activities. *Velazquez v. Legal Servs. Corp. (Velazquez I)*, 985 F.Supp. 323 (E.D.N.Y.1997). The *Velazquez* plaintiffs alleged the program integrity regulation failed to cure the constitutional issues raised by the district court in Hawaii because the financial and administrative costs of forming a separate affiliate organization remained an unconstitutional condition on their use of non-federal funds. *See id.* at 337; *see also Velazquez*

II, 164 F.3d at 765 ("Plaintiffs' . . . constitutional contention is that the program integrity rules . . . unreasonably burden a grantee's ability to use non-federal funds to engage in restricted activity."). The district court disagreed and the plaintiffs appealed to this Court.

B. *Velazquez II and III*

On appeal, we rejected the facial challenge to the regulation, holding that it did not impose an unconstitutional condition on the exercise of free speech rights. *See Velazquez II*, 164 F.3d at 766. We explained that "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Id.* Because the *Velazquez* plaintiffs had "provide[d] no basis for concluding that the program integrity rule[s] cannot be applied in at least some cases without unduly interfering with [a recipient's] First Amendment freedoms," we held that they could not sustain a facial challenge. *Id.* at 767.

However, we also noted in passing that the *Velazquez* plaintiffs "remain [ ] free to bring an as-applied challenge" and demonstrate that the program integrity rules "will, in the case of some recipients, prove unduly burdensome and inadequately justified, with the result that the 1996 Act and the regulations will suppress impermissibly the speech of certain funded organizations and their lawyers." *Id.*

Finally, we upheld as viewpoint neutral the 1996 Act's statutory restrictions that the *Velazquez* plaintiffs challenged,

with the exception of one proviso, which we found viewpoint discriminatory and invalid on its face under the First Amendment. *Id.* at 770-72. Our invalidation and consequent severance of the proviso were ultimately affirmed by the Supreme Court in *Legal Servs. Corp. v. Velazquez (Velazquez III)*, 531 U.S. 533, 549, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001), but that Court declined to review the rest of our decision, in particular as it related to our judgment on the regulation, 532 U.S. 903, 121 S.Ct. 1224, 149 L.Ed.2d 135 (2001) (Mem.) (denying certiorari).

III Present Proceedings

Following the Supreme Court's decision in *Velazquez III*, the litigation leading to the present appeal commenced. Having returned to the district court from the halls of One First Street, the *Velazquez* plaintiffs decided to pursue the as-applied challenge to the regulation contemplated by our *Velazquez II* opinion. Meanwhile, a new set of plaintiffs had filed a second, virtually identical action in the same district court, captioned *Dobbins v. Legal Servs. Corp.*, No. 1:01-CV-08371 (E.D.N.Y.2001), and the two actions were consolidated.

The joint plaintiffs sought a preliminary injunction against LSC's enforcement of both the 1996 Act and the program integrity regulation, raising the following challenges: (1) the as-applied challenge to the program integrity regulation under the First Amendment that was contemplated by *Velazquez II;* (2) a facial challenge to the regulation and the 1996 Act on a ground not raised in *Velazquez II*-that they violate "fundamental principles of

federalism" under the Tenth Amendment; and (3) a facial challenge under the First Amendment to the 1996 Act's restrictions on class action litigation, attorneys' fees, and soliciting clients. The defendant LSC, joined by the United States, moved to dismiss all the claims as legally groundless. In addition, they moved to dismiss the as-applied challenge to the regulation for lack of standing because the plaintiffs asserting the challenge had never attempted to comply with the regulation.

To address the standing issue, plaintiffs submitted to LSC a proposal that attempted to comply with the regulation. This so-called "clarified proposal" described the level of separation that the plaintiffs believed LSC could impose consistent with the First Amendment. The clarified proposal would permit the plaintiffs and their affiliate organizations to operate in the same physical premises, utilizing accounting measures to allocate the costs between the LSC-funded plaintiff and its unrestricted affiliate organization. On June 24, 2003 LSC rejected the proposal, stating that the proposed 100% sharing of physical space, equipment and staffs demonstrates that the clarified proposal as a whole fails to provide physical and financial separation as required by the regulation.

Following LSC's rejection of the clarified proposal, the district court ruled in favor of LSC on all of the plaintiffs' claims-except with regard to the as-applied challenge to the program integrity regulation on First Amendment grounds. As to that challenge, the court granted plaintiffs' preliminary injunction application, insofar as it requested that LSC be prevented from withholding federal funds if the plaintiffs

substantially complied with the clarified proposal. The trial court believed the clarified proposal fully satisfied most of LSC's legitimate interests in ensuring that federal funds were not diverted by recipients toward activities banned by Congress. Moreover, the court reasoned, requiring a separation greater than that contemplated by the clarified proposal would impose, in contravention of *Velazquez II*, an "undue burden" on plaintiffs' ability to use non-federal funds for protected activities, since the financial and administrative costs on plaintiffs of maintaining physically separate offices and personnel would be substantial, while the government's interests in imposing them were not.

All parties appealed the district court's ruling.

DISCUSSION

With this background in mind, we turn to the appeals before us. In reviewing a district court's decision on a motion for a preliminary injunction, we reverse only if there has been an abuse of discretion. Where the party seeking the injunction attempts to enjoin application of a governmental regulation, it must demonstrate irreparable harm should the injunction not be granted and a likelihood of success on the merits. *See Velazquez II*, 164 F.3d at 763; *Able v. United States*, 44 F.3d 128, 130-31 (2d Cir.1995) (per curiam).

I Regulation: As-Applied Challenge

LSC appeals the district court's order granting the preliminary injunction with regard to the program integrity regulation on two separate grounds: first, that plaintiffs

challenging the regulation lack standing; and second, that the district court erred in adopting the undue burden test, which in LSC's view is irrelevant to the analysis of whether the program integrity regulation violates the First Amendment. We discuss these two issues in order.

A. Standing

LSC moves first to dismiss plaintiffs' complaint pursuant to Rule 12(b)(1) for lack of standing. LSC also states the plaintiffs' as-applied challenge is not ripe for review. However, rather than raise distinct arguments pertaining to ripeness, LSC blends into one its ripeness and standing arguments. Since the two doctrines are closely related, most notably in the shared requirement that the injury be imminent rather than conjectural or hypothetical, the conflation seems to us neither surprising nor inaccurate. *See Warth v. Seldin*, 422 U.S. 490, 499 n. 10, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Bach v. Pataki*, 408 F.3d 75, 82 n. 15 (2d Cir.2005), *cert. denied*, __ U.S. __, 126 S.Ct. 1341, 164 L.Ed.2d 56 (2006); *Berger v. Heckler*, 771 F.2d 1556, 1562 n. 8 (2d Cir.1985).

Because LSC's ripeness arguments concern only that shared requirement- *i.e.*, LSC challenges the claim's ripeness on essentially the same grounds as those related to the plaintiffs' standing-it follows that our analysis of LSC's standing challenge applies equally and interchangeably to its ripeness challenge. We therefore do not address ripeness separately, but consider it together with, and as part of, the standing inquiry. *See* 13A Charles Alan Wright, Arthur R.

Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3531.12 (2d ed. 1984) ("The blending of standing and ripeness theories is so important that courts should become more assiduous to recognize the advantages of" considering the two as part of a single inquiry).

On a motion to dismiss for lack of standing, we presume the general factual allegations embrace those facts necessary to support the claim, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), and are constrained not only to accept the truth of the plaintiffs' jurisdictional allegations, but also to construe all reasonable inferences to be drawn from those allegations in plaintiffs' favor. *See Warth*, 422 U.S. at 501-02, 95 S.Ct. 2197; *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 140 (2d Cir.2001).

A party bringing suit in federal court must establish standing to sue, that is, that the plaintiff is entitled to have a federal court decide the merits of his case. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004). Such jurisdiction may be invoked only when a plaintiff has suffered "threatened or actual injury" that results from a defendant's alleged illegal act. *Warth*, 422 U.S. at 499, 95 S.Ct. 2197. Standing doctrine delimits federal jurisdiction to, among other things, cases involving real injuries to plaintiffs, the so-called "injury-in-fact" requirement. That requirement is a recognition of the policy of the Constitution that the federal courts will not adjudicate hypothetical disputes-that "the legal questions presented to the court will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of

judicial action." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Demonstrating injury in fact is thus one indicia that judicial power is not lightly being invoked.

While not easy to define, injury in fact has widely been described as "an invasion of a legally protected interest which is (a) concrete and particularized" (*i.e.*, "affect[ing] the plaintiff in a personal and individual way"); and "(b) actual or imminent, not 'conjectural' or 'hypothetical.' " *Lujan*, 504 U.S. at 560 & n. 1, 112 S.Ct. 2130 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). The plaintiffs must have "suffered some threatened or actual injury resulting from the putatively illegal action." *Warth*, 422 U.S. at 499, 95 S.Ct. 2197 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973)). In the First Amendment context, allegations of a "subjective chill" of free speech rights will not suffice to satisfy the injury-in-fact requirement. *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). Rather, a plaintiff must demonstrate some specific present or future objective harm that the challenged regulation has inflicted by deterring him from engaging in protected activity. *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 170 (2d Cir.1999).

LSC contends that because plaintiffs have not submitted a genuine proposal to form an affiliate or taken any action that would allow LSC to apply the program integrity rule to them, they have failed to demonstrate standing. This is in essence an argument that the dispute-and therefore the injury-

is hypothetical. LSC believes that its decision to reject the clarified proposal could not establish injury in fact with respect to plaintiffs because the proposal was so far outside the scope of what LSC would consider permissible that it was a means of presenting the same arguments to the district court that we had rejected as a facial matter in *Velazquez II*. Underlying LSC's view is the premise that its rejection of the clarified proposal did nothing to the plaintiffs except prevent them from forming affiliate organizations that the regulation already and patently prohibited.

That may or may not be the case. But the standing inquiry is not concerned with whether the clarified proposal violated the regulation; or even with whether the scope of that violation, if upheld, would effectuate a facial invalidation of the regulation. Such questions manifestly go to the merits of the plaintiffs' claim (that the clarified proposal is justified under the First Amendment regardless of the regulation), to which we will turn in a moment. The present question of standing, however, is resolved irrespective of the merits, for standing looks at "the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Thus, whether a plaintiff has standing will "depend[ ] considerably upon whether the plaintiff is himself an object of the [government action] at issue," and "[i]f he is, there is ordinarily little question that the action . . . has caused him injury." *Lujan*, 504 U.S. at 561-62, 112 S.Ct. 2130.

Here, in rejecting the clarified proposal, LSC, through its operation of the regulation, acted upon the plaintiffs by

depriving them of the ability to form unrestricted affiliates and thereby to express their putative free speech rights without risking enforcement action by LSC. The rejection put plaintiffs to the choice of either forgoing the exercise of certain constitutional rights they believed they were entitled to, or risking the loss of LSC funding by doing what LSC expressly directed them not to do.

That is hardly a hypothetical injury. *See, e.g., Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir.2003) (finding standing because a statute "present[ed] plaintiffs with the choice of risking prosecution" or forgoing purportedly protected First Amendment activity); *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir.2000) (noting fear of civil penalties can be as inhibiting of speech as facing threatened criminal prosecution, and finding standing). It is unreasonable to assume, as LSC would have us do, that if the plaintiffs actually formed the affiliates described in the proposal, LSC might take no action whatsoever against them, especially given its detailed and unequivocal rejection of the clarified proposal. *See Dean*, 342 F.3d at 101 (threshold for standing met by demonstrating "an actual and well-founded fear that the law will be enforced against" them); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement [but] . . . does not have to await the consummation of threatened injury to obtain preventive relief.").

Moreover, nothing in the record suggests the plaintiffs would meretriciously decline to form the affiliates they proposed in their clarified proposal, once LSC approved it. The clarified proposal as such, which is incorporated into the parties' stipulated facts, Stip. Facts ¶ 26, demonstrates its sincerity, and our review in favor of plaintiffs' allegations prevents us from questioning their motives. In any event, LSC does not seriously argue that the proposal is hypothetical because it lacks specificity, for the proposal is in fact specific. Rather, LSC contends the proposal is hypothetical because it is facially invalid-meaning that LSC vigorously disagrees with it and believes upholding it would render the regulation a nullity. As noted above, however, this merits argument is unpersuasive because, in addition to being circular, it is irrelevant to the standing issue. We conclude therefore that the plaintiffs have standing to assert their as-applied challenge to the regulation.

B. Merits

LSC next contends the district court applied the wrong legal test in its analysis of whether LSC's application of the regulation to plaintiffs violated the First Amendment. That court believed that we had adopted in *Velazquez II* a so-called "undue burden test" for such challenges. The trial court determined the content for that test-which *Velazquez II* did not provide, but which the district court found in Supreme Court precedent-to be "an intermediate form of review," a "balancing [of] the burdens imposed upon the plaintiff-grantees by LSC in the application of the program integrity rules, with its interests in doing so." *Velazquez v. Legal Servs. Corp. (Velazquez IV)*, 349 F.Supp.2d 566, 600 (E.D.N.Y.2004).

Appendix A

1. *Applicable Law*

As a preliminary matter, we point out that the controlling case in this Circuit for plaintiffs' challenge to the statute is *Velazquez II*, despite the difference of the as-applied posture. The instant as-applied challenge is, in all relevant respects, on all fours with its facial counterpart in *Velazquez II*. *See id.* at 574 (noting the as-applied challenge to LSC's program integrity rules "flow[s] from" the opening left by *Velazquez II*).

Although the district court may have been under the impression that as-applied and facial challenges bear no relation to each other, *see, e.g.*, *id.* at 599 ("[T]he Second Circuit's adoption of the undue burden standard was *dicta* since all that was before the court were facial challenges."); *id.* at 603 ("Initially, each of those cases only entailed facial challenges, invoking the restrictive constitutional principles applicable to such challenges."), this understanding is incorrect. Facial and as-applied challenges differ in *the extent to which* the invalidity of a statute need be demonstrated (facial, in all applications; as-applied, in a personal application). Invariant, however, is the *substantive rule of law* to be used. In other words, *how* one must demonstrate the statute's invalidity remains the same for both types of challenges, namely, by showing that a specific rule of law, usually a constitutional rule of law, invalidates the statute, whether in a personal application or to all. *See Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 293-94 (2d Cir.2006) (Walker, C.J., concurring) ("Facial challenges . . . permit a single injured party to assert the claims of all future litigants by making a showing that each time that a statute is enforced,

it will necessarily yield an unconstitutional result," but such challenges "provide[ ] no more relief than would be obtained over an exhaustive series of as-applied challenges"). *Velazquez II* supplied the rule of law for this appeal and the fact of this appeal's as-applied posture does nothing to alter that rule.

We also think it clear that *Velazquez II* controls with respect to the regulation despite the Supreme Court's decision in *Velazquez III*. *Velazquez III* was a review of a part of our *Velazquez II* judgment entirely unrelated to our discussion of the regulation. Moreover, the Supreme Court denied the *Velazquez* plaintiffs' petition for writ of certiorari concerning the regulation a few days after deciding *Velazquez III*, but significantly did not vacate and remand our judgment with respect to the regulation for reconsideration in light of *Velazquez III*. In short, *Velazquez II* remains good law and controls this appeal.

2. *Analysis*

With that in mind, we think the district court's adoption and subsequent application of a separate undue burden test were error. First, the district court misread our decision in *Velazquez II*. As that court itself recognized, the statement that application of the regulation may, "in the case of some recipients, prove unduly burdensome," 164 F.3d at 767, was pure dictum. More importantly, the statement did not purport to set forth a legal rule governing challenges to the regulation- a fact the district court apparently recognized, but ultimately ignored, when it observed that we cited no legal "authority for this *dicta*," *Velazquez IV*, 349 F.Supp.2d at 599. It is

difficult to conceive of our establishing a legal rule to govern future cases yet expressing neither intention nor rationale for doing so, not to mention citation to a single legal authority. *See CBS, Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 935 (2d Cir.1980) ("[A]ppellate courts, endeavoring to rule beyond the precise holding of a case, normally make [their intention to afford value to dictum] unmistakably clear.").

Doubtless the undue burden language was a more appealing candidate for divining a legal standard than the other plentiful dicta in *Velazquez II* because "undue burden" is a term of art, retaining a substantive meaning articulated by the Supreme Court independent of its dictionary meaning, *see Velazquez IV*, 349 F.Supp.2d at 598-603 (discussing the legal background of the test). But the *availability* of guidance from this Court or the Supreme Court regarding a particular legal standard is not a reason for choosing that standard. That is rather like choosing a chainsaw to perform delicate surgery because it comes with an extensive user's manual.

As described above, nothing in our discussion in *Velazquez II* suggests adoption of a separate test. And, even if the absence in *Velazquez II* of an intention "to rule beyond the precise holding of [the] case," *CBS*, 620 F.2d at 935, was insufficient to warrant caution in adopting the undue burden test, the trial court's review of the case law should have convinced it that reliance on the test would be misplaced. The lines of cases articulating the undue burden test and analyzed by the district court concern the direct regulation of conduct in the contexts of the Commerce Clause, abortion,

and voting rights, but plainly not the First Amendment. *See Velazquez IV*, 349 F.Supp.2d at 601-02.

Second, in addition to misreading *Velazquez II*, the district court focused its analysis too heavily upon LSC's asserted interests in imposing the physical separation requirement of the regulation. *See Velazquez IV*, 349 F.Supp.2d at 607-10. The trial court believed LSC's interests, which it boiled down to the interests against federal funds intermingling with non-federal funds and the appearance of governmental endorsement of restricted activities, could be fulfilled by means less restrictive than the regulation's requirement of physical separation. We cannot adopt this view for several reasons.

LSC's and the federal government's interests in these cases cannot be subject to the least- or less-restrictive-means mode of analysis-which, like the undue burden test itself, is more appropriate for assessing the government's direct regulation of a fundamental right-when the government creates a federal spending program. *See United States v. Am. Library Ass'n*, 539 U.S. 194, 211-12, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003); *cf. South Dakota v. Dole*, 483 U.S. 203, 207, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (courts should defer to the judgment of Congress in considering whether its exercise of the spending power is intended for the general welfare). This is so because while the First Amendment has application in the subsidy context, the government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech at stake. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998). That is to say,

Congress may through funding encourage a program in the public interest without being required to fund an alternative program. "So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities." *Id.* at 588, 118 S.Ct. 2168. Here, far from granting Congress wide latitude to set spending priorities, the district court's application of the less-restrictive-means analysis essentially demanded the government provide a compelling interest for the regulation-a demand more appropriate for the strict scrutiny analysis that was rejected in *Velazquez II* and not used in the government subsidies cases we found relevant there. *See Velazquez II*, 164 F.3d at 765-67.

To be sure, the government's interests are not completely irrelevant. *See, e.g., Rust*, 500 U.S. at 199, 111 S.Ct. 1759 (disclaiming the view that "funding by the Government ... is invariably sufficient to justify Government control over the content of expression"); *Regan v. Taxation With Representation* (*TWR*), 461 U.S. 540, 544 n. 6, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (leaving open the question whether "requirements that are unrelated to the congressional purpose" which "effectively make it impossible" for a restricted organization to establish an unrestricted affiliate are constitutional); *Velazquez II*, 164 F.3d at 766 (program integrity rules do not necessarily allow adequate avenues for protected expression "where the relationship between the burden and the government benefit may be more attenuated"). When the government's interests are so attenuated from the benefit condition as to amount to a pretextual device for suppressing dangerous ideas or driving certain viewpoints from the marketplace, then relief may indeed be appropriate.

See Finley, 524 U.S. at 587, 118 S.Ct. 2168. And, as we observed in *Velazquez II*, some of the 1996 Act's restrictions are directed toward speech on the "highest rung" of First Amendment values, requiring perhaps our closer attention. *See* 164 F.3d at 771 (hypothesizing that the Supreme Court would not tolerate a regulation "authoriz[ing] grants funding support for, but barring criticism of, governmental policy"). But that issue goes to the 1996 Act's substantive restrictions that are directed toward speech as such-for example, the statutory restrictions challenged in these cases. The program integrity regulation, by contrast, is not directed toward speech but toward ensuring the fulfillment of Congress' spending priorities, *see* 45 C.F.R. § 1610.1, and the fact that it requires LSC-fund recipients to expend their own funds to obtain a governmental subsidy cannot effect a *per se* invalidation of the operative regulation.

More fundamentally, upholding the mode of analysis utilized by the district court-balancing the plaintiffs' interests against those of the government-would wipe out the bulk of the regulation's applications and effectively invalidate it on its face, thus making the district court's ruling contrary to the holding in *Velazquez II* which upheld the regulation's facial validity. The district court's reasoning renders meaningless our statement that it appeared " *likely* that LSC grantees *with substantial non-federal funding* can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty," *Velazquez II*, 164 F.3d at 767 (emphasis added), because even an entity with unlimited private funds under the district court's rationale need not satisfy the regulation's physical separation requirements since less restrictive means of achieving LSC's

interests exist. It is noteworthy that the Supreme Court in Rust apparently was not concerned that the Department of Health and Human Services's program integrity regulation, upon which LSC's regulation is modeled, "required a certain degree of separation . . . in order to ensure the integrity of the federally funded program." 500 U.S. at 198, 111 S.Ct. 1759. And citing *FCC v. League of Women Voters*, 468 U.S. 364, 400, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984), the Supreme Court rejected the argument that the regulation violates the First Amendment by penalizing speech funded with non-federal money by requiring that recipients of grants help finance federally funded projects by using matching non-federal funds. *See Rust*, 500 U.S. at 199 n. 5, 111 S.Ct. 1759. Our holding in *Velazquez II*, unlike the district court's below, was consistent with this view.

Thus, the district court, with its focus on the undue burden dictum of *Velazquez II*, perhaps forgetfully lost sight of the true significance of that case: its description of the relevant legal framework for addressing First Amendment challenges to the regulation. Not only did we state in *Velazquez II* the governing law for these sorts of challenges; we applied it to this very regulation. As a consequence, the district court, instead of mistakenly working from what it perceived was a blank slate of applicable law, should have followed the clear tracks we left in *Velazquez II*.

In *Velazquez II*, we upheld the validity of the program integrity regulation under the rubric of "unconstitutional conditions," 164 F.3d at 765. Our statement of the legal framework for First Amendment challenges to the regulation was explicit: "Three Supreme Court cases provide the

framework for evaluating plaintiffs' unconstitutional conditions claim." *Id.* Those cases, *TWR*, *League of Women Voters*, and *Rust*, like this appeal, dealt with the difficult problem of government subsidies and whether restrictions on speech accompanying the subsidy were permissible. Our analysis of those cases was thorough and need not be repeated here, and it resulted in a plain and specific standard: "Taking [*TWR*, *League of Women Voters*, and *Rust*] together, we infer that, in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits *if the recipients are left with adequate alternative channels for protected expression.*" *Id.* at 766 (emphasis added). Addressing the facial challenge, *Velazquez II* essentially answered the antecedent clause of the standard in the affirmative. Congress may burden the First Amendment rights of the plaintiffs pursuant to the regulation. At issue in these cases is the second clause, whether the plaintiffs have demonstrated as a factual matter that the regulation has not left them adequate alternative channels for protected expression. The district court is in a better position to make this fact determination, and we leave it to that court to do so in the first instance utilizing the correct standard.

Nevertheless, aware that the standard articulated in *Velazquez II* might seem too general or even opaque, we point out that *Velazquez II* did not simply state the standard and leave it at that; it also elaborated a relatively detailed description of the sort of restrictions with respect to the regulation that might fail to provide adequate alternative channels for protected expression. For instance, we considered the allegations, "on the sparse record before [us]," that the regulation's physical separation requirements were

unconstitutional because they imposed extraordinary burdens that impede grantees from exercising their First Amendment rights, created prohibitive costs of compliance, and demanded an unjustifiable degree of separation of affiliates. *Id.* at 767. All of these allegations we rejected, but not on the ground that they were illegitimate as a matter of law; rather, we said that the record before us did not establish them as a matter of fact, since there was "little evidence to support ... predictions regarding how seriously the [regulations] will affect grantees generally." *Id.* It follows, then, that were the plaintiffs able to prove their allegations as a matter of fact, they might have sustained their challenge as applied under the adequate alternative channels test, though obviously no single factor will be dispositive.

At the same time, recognizing that "[a]ppellate guidance is not valueless because it is dictum," *CBS, Inc.*, 620 F.2d at 935, we do not ignore the undue burden language of *Velazquez II*. Acknowledging that the regulation may prove especially burdensome in the context of legal services, the *Velazquez II* Court said that if it "in fact unduly burden[ed] [the plaintiffs'] capacity to engage in protected First Amendment activity" the as-applied challenge might be sustained. 164 F.3d at 767. That was not, as discussed above, the adoption of an altogether different legal test from the one we had articulated just a few paragraphs earlier concerning adequate alternative channels. Rather, it was an invitation for the district court to use its judgment under the adequate alternative channel test. *Velazquez II's* pronouncement should be taken at face value. There we articulated that restrictions that unduly burden the ability of an organization to set up adequate alternative channels for

protected expression such that they are in effect precluded from doing so should be subject to invalidation. *See id.* at 766. Substantially burdening an organization's ability to set up an affiliate violates the standard in *Velazquez II* that require not simply the existence of an alternative channel but the existence of an "adequate" one. By definition, an alternative is inadequate if the government substantially or unduly burdens the ability to create the alternative. This conclusion is reflected in Supreme Court precedent addressing the very context with which we are confronted, namely government restrictions on speech accompanying subsidies. *See TWR*, 461 U.S. at 544 n. 6, 103 S.Ct. 1997; *cf. Am. Library Ass'n*, 539 U.S. at 215, 123 S.Ct. 2297 (Kennedy, J., concurring) (Because plaintiffs failed to show that adult library users' access to protected material was burdened in any significant degree, the statute is not unconstitutional on its face. However, if "an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge," not a facial one.).

It is our role to ensure that in making factual findings, the district court applies the proper legal test and applies it correctly. That was not done. Here, the district court's deviation from the adequate alternative test articulated in *Velazquez II* was error. The district court fashioned an "undue burden" test out of whole cloth from unrelated case law concerning abortion, commerce, and ballot access rights. *See Velazquez IV*, 349 F.Supp.2d at 601-02. It should have used the adequate alternative test we articulated in *Velazquez II* and considered whether the potential alternative channels were adequate in light of burdens imposed. In *Velazquez IV*,

the district court set out three specific burdens which could inform this decision, specifically, (1) financial, (2) programmatic, and (3) administrative, only to disregard them in reaching its conclusion. 349 F.Supp.2d at 604-05. After carefully detailing the annual budget and estimated cost of establishing an affiliate, i.e., an alternative channel, for each of three LSC grantees, the district court stopped its analysis of the burdens imposed. *See id.* at 605-07. It failed to analyze any specific financial or other burden in reaching its conclusion, and instead simply discussed the government's competing interests. *See id.* at 607. On remand, the district court should make factual findings under the adequate alternative test articulated in *Velazquez II* and consider whether the associated burdens in effect preclude the plaintiffs from establishing an affiliate. If so, the alternative channels are inadequate, and the plaintiffs may prevail on their as-applied challenge.

II Regulation: Establishment Clause Claim

As an alternative ground for upholding the preliminary injunction, plaintiffs maintain on cross-appeal that the program integrity regulation is facially unconstitutional under the Establishment Clause of the First Amendment because it discriminates against secular speech. As evidence of the discriminatory nature of the regulation, plaintiffs point to the level of separation required for similarly-situated religious organizations by the President's so-called faith-based initiative. *See, e.g.*, Equal Protection of the Laws for Faith-Based and Cmty. Organizations, Exec. Order No. 13,279, 67 Fed.Reg. 77,141 (Dec. 12, 2002). The faith-based initiative requires religious organizations receiving federal

funds to conduct their religious activities "separately in time or location from any programs or services supported with direct Federal financial assistance." *Id.* at 77,142. But, plaintiffs declare, the faith-based initiative order does not demand the degree of separation required by the program integrity regulation. Significantly, plaintiffs do not directly challenge the separation requirements of the initiative, which in any event are not before us, but they believe the situation discriminatory and violative of the Establishment Clause.

This assertion fails inasmuch as its premise is flawed. The program integrity regulation does not discriminate against secular speech, nor does it favor religious speech. The religious organizations that are similarly situated to the plaintiffs and wish to receive LSC funding must also comply with the regulation's requirement of physical and financial separation from their affiliates engaging in restricted activities. *See, e.g.*, 42 U.S.C. §§ 604a(h)(1) & 9920(d)(1); White House Office of Faith-Based and Cmty. Initiatives, *Guidance to Faith-Based and Cmty. Orgs. on Partnering with the Fed. Gov't* 15 (2003) (*also available at*, http://www.whitehouse.gov/government/fbci/guidance/index.html) ("Faith-based organizations that receive Federal funding are held to the same standards as all other providers of services.").

At bottom, plaintiffs believe that any governmental effort to accommodate a religious organization "impermissibly advanc[es] religion by giving greater protection to religious rights than to other constitutionally protected rights." *Cutter v. Wilkinson*, 544 U.S. 709, 724, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). Leaving aside the Supreme Court's rejection

of this proposition just last year in *Cutter*, *see id.* at 724-25, 125 S.Ct. 2113; *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-35, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987), we cannot adopt a view that Congress' decision to accommodate a religious organization in the distribution of its funds must by mandate of the Establishment Clause level the field for all other restrictions the government may place on totally unrelated programs.

III Tenth Amendment Claim

Further, plaintiffs contend on cross-appeal that the 1996 Act and the program integrity regulation are unconstitutional because they violate the Tenth Amendment and fundamental principles of federalism. The Tenth Amendment provides, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Reasoning that the LSC restrictions interfere with the states' ability to fund legal assistance programs that receive LSC funds and perform important functions on behalf of state judicial systems, plaintiffs insist that by this Congress intruded unacceptably on state sovereignty. The merits of this claim cannot be decided at this time, however, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (requiring jurisdictional issues be addressed prior to the merits), for it is apparent plaintiffs lack standing to assert it.

In *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939), state-chartered utility

companies contended that the sale of electrical power by a federally-chartered corporation, the Tennessee Valley Authority, amounted to federal regulation of purely local matters in violation of the Tenth Amendment, because the federal sales drove down electricity prices, thus indirectly regulating the companies' rates. *Id.* at 143, 59 S.Ct. 366. The Supreme Court, in rejecting this argument, observed that by contracting with state municipalities concerning electricity, the federal corporation was not regulating prices but "seeking and assuring a market for the power which the Authority has for sale, and a lawful means to that end." *Id.* at 144, 59 S.Ct. 366. The Court continued

> The sale of government property in competition with others is not a violation of the Tenth Amendment. As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] [A]mendment.

Id.

In this appeal, the requisite representation by the states or their officers is notably absent. The plaintiffs to this litigation-including the various government-donor plaintiffs who have sought to provide public non-federal funding to LSC-funded recipient programs-have brought suit against LSC in their personal, not official, capacities; that is, no plaintiff in this litigation represents a state or its instrumentality. Velazquez Compl. ¶¶ 10 & 16; *see Karcher*

v. May, 484 U.S. 72, 77-78, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543-44, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986). The Supreme Court's determination that the plaintiffs under these circumstances have no standing ends our inquiry.

The district court thus erred when it held that some of the plaintiffs had standing to assert rights under the Tenth Amendment, departing from the Supreme Court's ruling in *Tenn. Elec. See Velazquez IV*, 349 F.Supp.2d at 581-83. The trial court disregarded the ruling for two reasons. First, examining *Tenn. Elec.*, it found the Supreme Court's passing comment regarding Tenth Amendment standing was dicta since the Supreme Court reached the merits. *Id.* at 581-82. Second, relying principally on a case from another circuit, the trial court believed *Tenn. Elec.'s* binding authority was in any event greatly diminished by *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). *See Velazquez IV*, 349 F.Supp.2d at 582. In *New York*, responding to the argument that a federal statute cannot be an unconstitutional infringement of state sovereignty when state officials have consented to the statute's enactment, the Supreme Court said

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

505 U.S. at 181, 112 S.Ct. 2408. The district found this statement persuasive evidence that *Tenn. Elec.* was not controlling law because it established that the Tenth Amendment was designed to protect individual rights rather than the states' rights, thus conferring standing upon private individuals. *See Velazquez IV*, 349 F.Supp.2d at 582. However, both rationales are inapt and neither justifies departing from *Tenn. Elec.*

It is not clear that *Tenn. Elec.'s* statement regarding Tenth Amendment standing was dictum. The Supreme Court's holding, that the Authority's sale of electricity did not violate the Tenth Amendment, could be based either upon the merits-based reasoning the Court expressed just prior to the holding (the thrust of which was that the federal corporation was not regulating anything, much less matters of purely local concern), or upon the standing-based reasoning that immediately follows (contemplating only states have standing under the Constitution to assert a Tenth Amendment claim). Where the standing question concerns the constitutional jurisdiction of a federal court, however, the judgment on the jurisdictional issue predominates and is antecedent to any discussion of the merits, rendering the merits-based reasoning dicta. *See Steel Co.*, 523 U.S. at 94-95, 118 S.Ct. 1003. For "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 94, 118 S.Ct. 1003 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868)).

Thus, contrary to the district court's belief, *Tenn. Elec.'s* standing-based reasoning was not dicta but instead essential to its holding and thus binding. Moreover, even assuming *arguendo* that the standing-based reasoning did not supersede the merits-based reasoning, where two independent rationales support a decision by the Supreme Court, neither can be considered dictum, and each represents a valid holding of the Court. *See Medeiros v. Vincent*, 431 F.3d 25, 34 (1st Cir.2005) (applying this rule to *Tenn. Elec.'s* Tenth Amendment holding). Accordingly, the holding of the *Tenn. Elec.* Court, that is, its power to bind lower federal courts, was based upon the standing rationale, which this Court must follow. *Cf.* 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4421 (2d ed. 2002) ("A court that admits its own lack of power to decide [the merits] should not undertake to bind a court that does have power to decide" the merits).

Further, *New York* does not support overruling *Tenn. Elec.* The issue of Tenth Amendment standing is not even indirectly addressed in *New York*. As the First Circuit observed, neither *Tenn. Elec.* nor standing is discussed in that case. *See Medeiros*, 431 F.3d at 34. The quoted passage upon which the district court relied concerns the *states'* ability to *waive* Tenth Amendment violations and has nothing to do with standing. We recognize that construing *New York* to diminish the weight of *Tenn. Elec.'s* reasoning is one possible reading of the case, *see, e.g., Gillespie v. City of Indianapolis*, 185 F.3d 693, 703-04 (7th Cir.1999), but the federal courts have come to no settled consensus on the issue, *see Medeiros*, 431 F.3d at 35-36 (collecting and discussing cases reaching conflicting conclusions with respect to Tenth Amendment

standing); *cf. Pierce County, Wash. v. Guillen*, 537 U.S. 129, 148 n. 10, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003) (declining to address the certiorari-granted question whether private plaintiffs have standing to assert a claim under the Tenth Amendment). *But cf. Flast*, 392 U.S. at 105, 88 S.Ct. 1942 (implying that private individuals may *not* assert the states' interest in their legislative prerogatives). We are nonetheless bound by the rule that "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *Tenet v. Doe*, 544 U.S. 1, 10-11, 125 S.Ct. 1230, 161 L.Ed.2d 82 (2005).

In sum, *Tenn. Elec.* here controls, and the district court erred by ruling otherwise and by failing to dismiss the plaintiffs' Tenth Amendment claim pursuant to Rule 12(b)(1) for lack of standing.

IV

Finally, we reject the plaintiffs' challenge to the facial validity of the 1996 Act's restrictions on class actions, attorneys' fees, and in-person solicitation of clients, *see* 1996 Act § 504(a)(7), (13), & (18); 45 C.F.R. pts. 1617, 1638, & 1642. We refer the reader to the district court's thorough analysis of the law and the facts to this challenge. *See Velazquez IV*, 349 F.Supp.2d at 585-98. That analysis convincingly demonstrates that plaintiffs' arguments

(consisting of a mere five pages in their 85-page brief) regarding the statutory restrictions are without merit. We concur in that discussion.

CONCLUSION

Because our disposition of this appeal requires the district court to consider anew on remand the as-applied challenge to the program integrity regulation, we need not address whether the court erred by fashioning the injunction to require recipient programs to maintain physically separate public areas and program attorneys to withdraw their representation of a client upon discovering a restricted component in a case.

Accordingly, the district court's partial grant of the preliminary injunction is hereby vacated. Its order granting in part and denying in part LSC's motion to dismiss plaintiffs' Tenth Amendment challenge for lack of standing is also vacated, with instructions to grant the motion in toto. In all other respects the orders of the district court are affirmed, and the matter is remanded for further proceedings consistent with this opinion.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK AS CORRECTED FEBRUARY 22, 2005

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Nos. 97-CV-182, 01-CV-8371

CARMEN VELAZQUEZ, WEP Workers Together!, Community Service Society of New York, Inc., New York City Coalition to End Lead Poisoning, Centro Independiente De Trabajadores Agricolas, Inc., and Greater New York Labor-Religion Coalition, on behalf of all similarly situated individuals, organizations and their members; namely, individuals and organizations who are, or wish to be, represented by lawyers employed by entities receiving funds from the Legal Services Corporation, and who wish to assert legal claims as members of a class, or to benefit from some other legal advocacy activity proscribed by Pub.L. 104-208;

Farmworkers Legal Services of New York, Inc., on behalf of itself, and on behalf of all similarly situated not-for-profit legal services entities; namely, organizations who wish to be eligible to receive funds from the Legal Services Corporation, and who wish to be free to engage in legal advocacy activities that are proscribed by Pub.L. 104-208;

Lucy A. Billings, Peggy Earisman, Olive Karen Stamm, Jeanette Zelhof, Elisabeth Benjamin, Jill Ann Boskey, and Lauren Shapiro, on behalf of each, and on behalf of all similarly situated individuals; namely, attorneys employed or formerly employed by entities receiving funds from the Legal Services Corporation who wish to be free to represent indigent individuals in class actions, and to engage in other attorney-client activities that are proscribed by Pub.L. 104-208;

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and

Andrew J. Connick, Councilmember C. Virginia Fields, Councilmember Guillermo Linares, Councilmember Stanley Michels, Councilmember Adam Clayton Powell, IV, Senator Lawrence Seabrook, and Assemblyman Scott M. Stringer, on behalf of themselves and all similarly situated individuals; namely, individuals who have provided public or private non-federal funding to entities that also receive funds from the Legal Services Corporation, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub.L. 104-208,

Plaintiffs,

v.

LEGAL SERVICES CORPORATION,

Defendant.

David F. Dobbins, New York Foundation, Lisa E. Cleary, David W. Ichel, David G. Keyko, Mfy Legal Services, Inc., Brooklyn Legal Service Corp. B, Legal Services for New York City, Bronx Legal Services, Inc on their own behalf and on behalf of their clients,

Plaintiffs,

v.

Legal Services Corporation,

Defendant.

Feb. 22, 2005.
As Corrected Feb. 22, 2005.

Appendix B

SUPPLEMENTAL MEMORANDUM AND ORDER

BLOCK, District Judge.

I.

In its December 20, 2004 Memorandum & Order ("M & O") in the above-captioned actions granting, in part, plaintiffs' motion for a preliminary injunction, the Court invited the parties to "notify the Court ... whether there are any viable claims that remain and, if not, whether there is any reason why finality should not now be achieved by converting the preliminary injunction into a permanent injunction." *Velazquez v. Legal Services Corp.*, 349 F.Supp.2d 566, 613 n. 26 (E.D.N.Y.2004). Having reviewed the parties' responses, the Court will not enter a permanent injunction at this time; moreover, the Court modifies its M & O in one respect.

In their response to the Court's invitation, plaintiffs conditioned their consent to entry of a permanent injunction on the Court eliminating "provisions of the [M & O] that some might construe as" imposing "restrictions on the plaintiffs beyond those that ... LSC already imposes." Letter from Burt Neuborne on behalf of plaintiffs (Jan. 20, 2005) at 1. Specifically, plaintiffs took issue with provisions requiring (1) that LSC-grantees and their affiliates maintain separate rooms for areas "open to the public (for example, reception areas and conference rooms to meet with clients or to conduct depositions or interview witnesses) ... [because] permitting client contact with LSC and non-LSC clients in the same room, albeit at different times, is bound

to create public confusion, and should not be countenanced," *Velazquez*, 349 F.Supp.2d at 612, and (2) that "lawyers handling a case containing both restricted and non-restricted components must identify themselves as lawyers for the affiliate and charge all their time and costs to the affiliate for the duration of the case." *Id.*

With respect to the former provision, plaintiffs contended that "[r]equiring two sets of waiting areas and conference rooms .. . imposes an unnecessary and unjustifiable burden on the day-to-day activities of a legal services office."[1] Pls.' Mem. Regarding Remaining Claims at 3. With respect to the latter provision, plaintiffs contended that it could be construed as prohibiting activities permitted under LSC's regulations, for example, "representing a client until he or she becomes ineligible"; "representing a case in which a sudden need later arises to seek a fee award"; and "representing a client in a class action in circumstances in which LSC's regulations authorize representation pursuant to the class action restriction." Letter from Neuborne at 1-2.

Prior to plaintiffs' submission, defendant LSC expressed its belief that the M & O "fully resolved all outstanding issues, and that plaintiffs do not have any viable claims

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1. In support of their argument that requiring LSC grantees and their affiliates to maintain separate public areas imposed an unnecessary and unjustifiable burden, plaintiffs submitted declarations from the executive directors of plaintiffs Legal Services of New York City and Farmworker Legal Services of New York, which contained new factual allegations not previously presented to the Court. *See* Decl. of Andrew Scherer; Declaration of James F. Schmidt.

remaining"; accordingly, it had no objection to the Court converting its preliminary injunction into a permanent injunction. Letter from Stephen Ascher on behalf of LSC (Jan. 19, 2005) at 1. LSC also noted that it was simultaneously filing a notice of appeal. *See id.*; *see also* [LSC's] Notice of Appeal (Jan. 19, 2005). After receiving plaintiffs' submission, LSC wrote that the issues plaintiffs raised were based on new facts that were not properly before the Court, and that their concerns "appear[ed] to be based on the ... assumption that LSC will apply the Court's ruling not only unconstitutionally, but in bad faith." Letter from Stephen L. Ascher on behalf of LSC (Jan. 26, 2005) at 1.

Defendant-intervener United States ("Government") argued that plaintiffs' request to eliminate the requirement that LSC grantees and their affiliates maintain separate public areas "would have the Court endorse a subterfuge that would allow [grantees] to feign compliance with the LSC statute by engaging in restricted activities through 'affiliates' that, in all meaningful respects, are precisely the same entity." *See* [Government's] Mem. Opp. Pls.' Request for Perm. Inj. at 1. With respect to the requirement that in cases with restricted components, lawyers identify themselves as working for the affiliate and charge their time and costs to the affiliate, the Government argued that

> the Court can simply clarify that this particular requirement applies solely to cases that contain "restricted" components as described in the statute and the LSC's implementing regulation. Thus, for example, a case involving a client who is currently eligible (but who may become ineligible) would

> contain a "restricted" component only if and when the client becomes ineligible.

Id. at 4. Despite the parties' disagreement, the Government contended that "there is no sound reason for the Court to delay entry of judgment in this protracted litigation" by converting its preliminary injunction into a permanent injunction. *Id.* at 1 n. 1.

In subsequent informal telephone conferences with the parties, the Court commented that after reviewing the parties' post-M & O submissions, it believed that the provision of its M & O requiring that "lawyers handling a case containing both restricted and non-restricted components must identify themselves as lawyers for the affiliate and charge all their time and costs to the affiliate for the duration of the case," lacked clarity and was not in keeping with the conceptual bases for its M & O. Accordingly, it offered the parties an opportunity to collectively propose an appropriate modification, without prejudice. On February 17, 2005, counsel for LSC contacted chambers and informed the Court that the parties had not been able to do so. On that same day, the Government also filed a notice of appeal, *see* [Government's] Notice of Appeal (Feb. 17, 2005), and plaintiffs filed a notice of cross-appeal. *See* [Plaintiffs'] Notice of Cross-Appeal (Feb. 17, 2005).

II

With respect to plaintiffs' argument that the Court should eliminate the requirement that LSC-grantees and their affiliates maintain separate rooms for areas open to the public, the Court notes that in crafting its injunction, it "agree[d]

with LSC that some degree of separate physical premises [was] justified to avoid the appearance of endorsement[.]" *Velazquez*, 349 F.Supp.2d at 612. It therefore concluded that drawing a distinction between the public and non-public aspects of legal representation would be a sound conceptual dichotomy in balancing the parties' respective interests under the undue burden test; to do otherwise would risk obfuscating all lines of physical separateness, thereby unduly compromising the Government's legitimate interest, albeit of limited weight, in preventing the appearance of the endorsement of restricted activities.

Accordingly, the Court declines the plaintiffs' invitation to modify its M & O based on the current record to permit the same facilities to be used for public and nonpublic purposes as a condition for serving a quietus to this litigation so that a permanent injunction may now be entered. In doing so, it notes that many of the facts which plaintiffs rely on in support of their contention are not the subject of the parties' stipulated facts and, if plaintiffs choose to pursue their litigation, they will have the burden of establishing these facts.

Moreover, since all parties have appealed, and "[t]hose portions of a decree that are disapproved of may be modified by an appellate court," *Olivieri v. Ward*, 801 F.2d 602, 607-08 (2d Cir.1986), the circuit court will undoubtedly have its own take on the nature of the undue-burden test and its application to the present case, given its unique and unprecedented aspects, which will guide the Court in the event that the circuit court modifies the preliminary injunction or otherwise aids it in the ultimate disposition of

the litigation. *See* id. (modifying injunction specifying terms under which demonstrators could assemble on sidewalk in front of St. Patrick's Cathedral); *see also Million Youth March, Inc. v. Safir*, 155 F.3d 124, 127 (2d Cir.1998) (affirming and modifying a preliminary injunction requiring the City to issue a parade permit to an organization seeking to hold a public event).

III

With respect to that aspect of the M & O requiring that "lawyers handling a case containing both restricted and non-restricted components must identify themselves for the affiliate and charge all their time and costs to the affiliate for the duration of the case," the Court believes that clarification is necessary because this suggests that the same lawyer can handle a case that contains both restricted and non-restricted components, or continue to handle a case for a client who initially qualifies for retention by an LSC grantee but whose subsequent change in status disqualifies the LSC grantee lawyer from continued retention; this was not the Court's intent. For example, in that latter regard, LSC regulations appropriately require that when "a client who was an eligible alien becomes ineligible through a change in circumstances, continued representation is prohibited ... and a recipient must discontinue representation consistent with the applicable rules of professional responsibility." 45 C.F.R. § 1626.9. Similarly, if "a client becomes incarcerated after litigation has commenced, the recipient must use its best efforts to withdraw promptly from the litigation, unless the period of incarceration is anticipated to be brief and the litigation is likely to continue beyond the period of incarceration."

45 C.F.R. § 1637.4. Despite the parties' pending appeals, the Court retains jurisdiction to clarify its injunction. *See, e.g., Meinhold v. United States Dep't of Def.*, 34 F.3d 1469, 1480 n. 14 (9th Cir.1994) (holding that modification of preliminary injunction during pendency of appeal was proper to clarify injunction).

While requiring an attorney to be identified as an attorney for the LSC grantee or affiliate for a given case is sufficient to serve the Government's interest in preventing the appearance of endorsement, the same cannot be said if the same attorney were to render legal services for restricted and non-restricted aspects of *the same case*; the risk of public confusion is too great and cannot in the Court's view be effectively addressed by disclaimers.

Accordingly, the Court clarifies its preliminary injunction by striking the following language:

> However, lawyers handling a case containing both restricted and non-restricted components must identify themselves as lawyers for the affiliate and charge all their time and costs to the affiliate for the duration of the case

and replacing it with the following:

> If at the time a lawyer commences representation of a client, the representation does not involve a restricted component, the lawyer may identify him or herself as a lawyer for either the LSC grantee or affiliate, and must charge all time and costs to

the entity so identified. If at the time a lawyer commences representation of a client, the representation involves any restricted component, the lawyer must identify him or herself as a lawyer for the affiliate and charge all time and costs to the affiliate. If in the course of representation for which the lawyer has initially been identified as a lawyer for the LSC grantee, the client becomes ineligible or the case otherwise comes to involve a restricted component, the lawyer must withdraw from representation in accordance with LSC's regulations. Any other lawyer taking over the representation on behalf of an affiliate must identify him or herself as a lawyer for the affiliate and must from the time he or she takes over representation charge all time and costs to the affiliate.

IV

The need for this Supplemental Memorandum and Order reflects the reality that the Court cannot, and should not, envision all the situations that may arise in the relationship between the parties in attending to the formation and management of LSC affiliates and to the relationship and interaction between LSC grantees and their affiliates. Although the Court has jurisdiction to supervise the conduct of the parties since "an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief," *System Fed'n No. 91 v. Wright*, 364 U.S. 642, 647, 81 S.Ct. 368, 5 L.Ed.2d

349 (1994), the high level of the professionalism exhibited by the parties' attorneys throughout this litigation suggests that this will not be necessary and that they will be able to resolve any particulars that may divide them within the framework and spirit of the Court's injunctive guidelines.

CONCLUSION

The Court declines to convert its preliminary injunction into a permanent injunction. The Court's preliminary injunction is modified in accordance with this Memorandum and Order.

SO ORDERED.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED DECEMBER 20, 2004

UNITED STATES DISTRICT COURT
E.D. NEW YORK.

Nos. 97-CV-182, 01-CV-8371.

Dec. 20, 2004.

Carmen VELAZQUEZ, Wep Workers Together!, Community Service Society of New York, Inc., New York City Coalition to End Lead Poisoning, Centro Independiente de Trabajadores Agricolas, Inc., and Greater New York Labor-Religion Coalition, on behalf of all similarly situated individuals, organizations and their members; namely, individuals and organizations who are, or wish to be, represented by lawyers employed by entities receiving funds from the Legal Services Corporation, and who wish to assert legal claims as members of a class, or to benefit from some other legal advocacy activity proscribed by Pub.L. 104-208;

Farmworkers Legal Services of New York, Inc., on behalf of itself, and on behalf of all similarly situated not-for-profit legal services entities; namely, organizations who wish to be eligible to receive funds from the Legal Services Corporation, and who wish to be free to engage in legal advocacy activities that are proscribed by Pub.L. 104-208;

Lucy A. Billings, Peggy Earisman, Olive Karen Stamm, Jeanette Zelhof, Elisabeth Benjamin, Jill Ann Boskey, and Lauren Shapiro, on behalf of each, and on behalf of all similarly situated individuals; namely, attorneys employed

or formerly employed by entities receiving funds from the Legal Services Corporation who wish to be free to represent indigent individuals in class actions, and to engage in other attorney-client activities that are proscribed by Pub.L. 104-208;

and

Andrew J. Connick, Councilmember C. Virginia Fields, Councilmember Guillermo Linares, Councilmember Stanley Michels, Councilmember Adam Clayton Powell, IV, Senator Lawrence Seabrook, and Assemblyman Scott M. Stringer, on behalf of themselves and all similarly situated individuals; namely, individuals who have provided public or private non-federal funding to entities that also receive funds from the Legal Services Corporation, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub.L. 104-208,

Plaintiffs,

v.

LEGAL SERVICES CORPORATION, Defendant. David F. Dobbins, New York Foundation, Lisa E. Cleary, David W. Ichel, David G. Keyko, MFY Legal Services, Inc., Brooklyn Legal Service Corp. B, Legal Services for New York City, Bronx Legal Services, Inc, on their own behalf and on behalf of their clients,

Plaintiffs,

v.

Legal Services Corporation,

Defendant.

Appendix C

MEMORANDUM & ORDER

BLOCK, District Judge.

[Table of Contents and Authorities intentionally omitted]

INTRODUCTION

General familiarity with the prior litigation in Action I (the *Velazquez* action) is presumed, as encompassed by this Court's decision in *Velazquez v. Legal Services Corp.*, 985 F.Supp. 323 (E.D.N.Y.1997) ("*Velazquez I*"), the Second Circuit's decision in *Velazquez v. Legal Services Corp.*, 164 F.3d 757 (2d Cir.1999) ("*Velazquez II* "), and the Supreme Court's decision in *Legal Services Corp. v. Velazquez,* 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001) ("*Velazquez III*"). Action II (the *Dobbins* action) was filed after the Supreme Court rendered its decision in *Velazquez III.* Before the Court are the following preliminary injunction applications: (1) all the plaintiffs in both actions bring a facial Tenth Amendment challenge to the extension of the restrictions Congress has imposed on legal-services entities that accept funding from defendant Legal Services Corporation ("LSC") to state and local-government funding of these entities; (2) all the plaintiffs in both actions bring facial First Amendment challenges to three such restrictions: the class-action, attorney's-fees and solicitation prohibitions; (3) two of the *Dobbins* plaintiffs, South Brooklyn Legal Services ("SBLS") and Legal Services of New York ("LSNY"), and one of the *Velazquez* plaintiffs, Farmworker Legal Services ("FWLS") (collectively "plaintiff-grantees"), bring as-applied First Amendment challenges to LSC's

program integrity rules. LSC and the United States intervener (the "Government") (collectively "defendants") seek dismissal of both actions pursuant to Fed. R. Civ. Pro. 12(b)(1) and 12(b)(6).

The Court rejects all facial challenges, but grants plaintiff-grantees preliminary injunctive relief in respect to their as-applied challenges.[1]

BACKGROUND

A. Present Procedural Framework

1. *Velazquez*

The *Velazquez* complaint, as amended, mounted a broad-scaled attack under the First, Fifth and Tenth Amendments to proscribed activities imposed on recipients of LSC funds under the Omnibus Consolidated Rescissions and Appropriations Act of 1996 § 504, 110 Stat. 1321-53 (the "Act"),[2] and a regulation enacted by LSC authorizing

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1. The complexity of this latest chapter of this litigation and the importance of the issues before the Court are reflected by the substantial amount of material presented to the Court, which includes the parties' six memoranda, volumes of supporting declarations, affidavits and other documentation, an amicus brief, three oral arguments, and seventeen letter briefs.

2. As best the Court can glean, the following are the challenged restrictions:

None of the funds appropriated in this Act to the Legal

(Cont'd)

Appendix C

(Cont'd)

Services Corporation may be used to provide financial assistance to any [recipient]:

(2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency [the "executive-order restriction"];

(3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect [the "agency-adjudication restriction"];

(4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body [the "legislation restriction"] [collectively, subsections (2), (3) and (4) are referred to as the "lobbying restrictions"];

(7) that initiates or participates in a class action suit [the "class-action restriction"];

(11) that provides legal assistance for or on behalf of [certain] alien[s];

(13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the

(Cont'd)

recipients of LSC funds to create affiliates with non-LSC funds to perform restricted activities, provided there be compliance with LSC's program integrity rules.[3] In addition

(Cont'd)

> awarding of such fees [the "attorney's-fees" restriction];
>
> (15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison;
>
> (16) that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation [the "welfare-reform restriction"];
>
> (18) unless such person or entity agrees that the person or entity, and the employees of the person or entity, will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action, and will not refer such nonattorney to another person or entity or an employee of the person or entity, that is receiving financial assistance provided by the Corporation [the "solicitation restriction"]

Act § 504(a). *See also Velazquez I*, 985 F.Supp. at 328 n. 7 (setting forth provisions challenged).

3. 45 C.F.R. § 1610.3 provides "[a] recipient may not use non-LSC funds for any purpose prohibited by the LSC Act or for any (Cont'd)

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(Cont'd)
activity prohibited by or inconsistent with [the Act], unless such use is authorized by [these regulations]." The program integrity rules are set forth in 45 C.F.R. § 1610.8 and provide:

> (a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:
>
> (1) The other organization is a legally separate entity;
>
> (2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and
>
> (3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:
>
> (i) The existence of separate personnel;
>
> (ii) The existence of separate accounting and timekeeping records;
>
> (iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and

(Cont'd)

to FWLS, a former recipient of LSC funds, which refused to accept such funds after the Act's restrictions went into effect, the other *Velazquez* plaintiffs are clients of LSC grantees, lawyers employed by LSC grantees, and public-office holders of state and local governmental entities, which entities have given non-federal monies to LSC grantees ("government-donor plaintiffs"). In *Velazquez I,* the Court tersely disposed of plaintiffs' Fifth Amendment challenge, finding no due process or equal protection violations, and rejected their First Amendment facial challenge to the program integrity rules, holding that they were lawfully adopted by LSC and facially afforded a means by which LSC-fund recipients could create affiliates with non-LSC funds to engage in activities prohibited by the Act. Plaintiffs appealed the rejection of their First Amendment challenge, and the Court of Appeals affirmed. In doing so, it also passed upon plaintiffs' facial challenges to some of the restricted activities. Other than their challenge to the "suits-for-benefits" exception of the welfare-reform restriction, the circuit court rejected all such facial challenges, finding the restrictions to be viewpoint neutral. In respect to the "suits-for-benefits" exception, the

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(Cont'd)

> (iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.
>
> (b) Each recipient's governing body must certify to the Corporation within 180 days of the effective date of this part that the recipient is in compliance with the requirements of this section. Thereafter, the recipient's governing body must certify such compliance to the Corporation on an annual basis.

circuit court held that it violated the First Amendment because it "unconstitutionally restricts freedom of speech, insofar as it restricts a grantee, seeking relief for a welfare applicant, from challenging existing law." *Velazquez II,* 164 F.3d at 772. On that issue, the Supreme Court granted LSC's application for *certiorari, see Legal Services Corp. v. Velazquez,* 529 U.S. 1052, 120 S.Ct. 1553, 146 L.Ed.2d 459 (2000), but affirmed. *See Velazquez III,* 531 U.S. at 549, 121 S.Ct. 1043.[4]

Having been denied a preliminary injunction based on their *facial* constitutional challenges under the First and Fifth Amendments (other than their successful First Amendment challenge to the "suits-for-benefits" exception), plaintiffs now seek a second preliminary injunction. They press at this time their facial Tenth Amendment challenge, claiming that subjecting the use of funds from state and local governments to the same restrictions applicable to LSC funds impermissibly intrudes upon state and local-government autonomy. In respect to their facial challenges to the class-action, attorney's-fees and solicitation restrictions, they contend that the solicitation challenge had been part of their prior preliminary injunction application, but was not addressed by either the district court or circuit court in *Velazquez I* and *II,* and that even if the circuit court's decision in *Velazquez II* be construed as passing upon and rejecting the facial challenges to the class-action and attorney's-fees restrictions, each of these three facial challenges must now be reevaluated as a consequence of the Supreme Court's

4. The Supreme Court denied plaintiffs' application for *certiorari. See Velazquez v. Legal Services Corp.,* 532 U.S. 903, 121 S.Ct. 1224, 149 L.Ed.2d 135 (2001).

decision in *Velazquez III.* Furthermore, FWLS raises for the first time an *as-applied* First Amendment challenge to LSC's application of its program integrity rules, asserting that they impose an unconstitutional undue burden on its ability to create a non-LSC funded affiliate to engage in the Act's restricted activities.

2. *Dobbins*

In the *Dobbins* action, all the plaintiffs-LSC grantees, former LSC grantees, and private donors-none of whom are plaintiffs in *Velazquez,* join *Velazquez* plaintiffs' preliminary injunction applications as to their facial Tenth Amendment challenge and facial First Amendment challenges to the class-action, attorney's-fees and solicitation restrictions. In addition, two of the plaintiff-grantees, SBLS and LSNY, join *Velazquez* plaintiff FWLS in mounting as-applied First Amendment challenges to LSC's application of its program integrity rules.

B. The As-Applied Challenges

The as-applied challenges to LSC's application of its program integrity rules flow from the recognition by the circuit court in *Velazquez II* that, although "Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression[,]" 164 F.3d at 766,

> [i]t may be, as plaintiffs urge, that the program integrity rules will, in the case of some recipients,

> prove unduly burdensome and inadequately justified, with the result that the 1996 Act and the regulations will suppress impermissibly the speech of certain funded organizations and their lawyers. And it may be, as plaintiffs contend, that the program integrity requirements may prove especially burdensome in the context of legal services. We are unable to assess these contentions on the sparse record before us, and we need not assess them to decide this appeal. Any grantee capable of demonstrating that the 1996 restrictions in fact unduly burden its capacity to engage in protected First Amendment activity remains free to bring an as-applied challenge to the 1996 Act. But plaintiffs present little evidence to support their predictions regarding how seriously the 1996 Act will affect grantees generally, and they provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with grantees' First Amendment freedoms.

Id. at 767.

On April 25, 2003, SBLS, LSNY and FWLS submitted an affiliation proposal to the Court, a structure these plaintiff-grantees contended would not impose an undue burden on their First Amendment rights. LSC rejected the proposal because, *inter alia,* it believed it was merely "a generalized outline of a set of hypothetical affiliations." Letter from Stephen L. Ascher on behalf of LSC (May 9, 2003) at 1. In response, on May 22, 2003, the plaintiff-grantees submitted

a "Clarification of Configuration Proposal" ("Clarified Proposal"),[5] which provided more detail:

1. **Legal separation**-Eacn of the grantee-plaintiffs (also referred to as "LSC grantee affiliates") proposes to establish a legally separate corporation (the "non-LSC grantee affiliate") with its own articles of incorporation and bylaws, in accordance with the laws of New York State.

2. **Easily distinguishable names**-The LSC grantee affiliates propose, at this time, to use the following names for each respective non-LSC grantee affiliate:

LSC grantee affiliate	*Non-LSC grantee affiliate*
Legal Services for New York City	New York City Justice Center
South Brooklyn Legal Services	South Brooklyn Justice Center
Farmworker Legal Services of [NY]	Farmworker Justice Center

5. The Clarified Proposal is attached to the Letter from Stephen L. Ascher on behalf of LSC (June 24, 2003). With the exception of internal citations and footnotes, the Court includes the Clarified Proposal in its entirety.

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3. **Separate boards of directors**-The boards of directors of the LSC grantee affiliates and of the non-LSC grantee affiliates, will be separate: a) the boards of the respective LSC and non-LSC affiliates will meet separately and maintain separate records; and b) the membership of the boards of directors of the LSC and non-LSC affiliates will be coextensive at the outset, but this may change over time depending on various factors. Moreover, plaintiff-grantee LSNY would prefer to operate through an affiliate structure in which LSNY would possess authority to determine the composition of the board of the New York City Justice Center.

4. **No subsidy**-No LSC grantee affiliate will transfer any LSC funds to a non-LSC grantee affiliate. Affiliated organizations will apportion fair value for expenses in accordance with generally accepted accounting principles and the requirements of the LSC Accounting Guide for LSC recipients, the LSC Office of Inspector General Audit Guide for Recipients and Auditors, and LSC regulation 45 C.F.R. § 1630, Cost Standards and Procedures, which provides "uniform standards for allowability of costs" charged to LSC grants, including both direct costs (e.g., salaries) and indirect costs (e.g., utilities and other forms of overhead costs). In particular, affiliated

organizations will allocate indirect costs pursuant to 45 C.F.R. § 1630.3(f) which governs the allocation of indirect costs by LSC grantees, and by separately identifying the total costs for restricted activities and treating these costs as disallowed costs pursuant to 45 C.F.R. § 1630.2(d).

5. **Employee timekeeping measures**-Any employee in the category of "legal personnel" who is employed part-time by an LSC grantee affiliate and by a non-LSC grantee affiliate, will maintain detailed time records for the work performed for each affiliate. These records will comply with LSC's timekeeping regulation, 45 C.F.R. § 1635, including the requirement that an LSC grantee:

shall require any attorney or paralegal who works part-time for the recipient and part-time for an organization that engages in restricted activities to certify in writing that the attorney or paralegal has not engaged in restricted activity during any time for which the attorney or paralegal was compensated by the recipient or has not used recipient resources for restricted activities. The certification requirement does not apply to a *de minimis* action related to a restricted activity.

45 C.F.R. § 1635.3(d).

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Additionally, any employee in the category of "non-legal personnel" (i.e., support personnel) who is employed part-time by an LSC grantee affiliate and by a non-LSC grantee affiliate, will maintain personnel activity reports, pursuant to LSC regulation 45 C.F.R. § 1630.3(d), for work performed for each affiliate. The regulation, which provides standards governing allowability of costs under LSC grants or contracts, incorporates the detailed guidance about personnel activity reports contained in Office of Management and Budget ("OMB") Circular A-122, Cost Principles for Non-Profit Organizations, Attachment B, para. 6(*l*)(2) (Aug. 29, 1997). . . .

No legal personnel, and no non-legal personnel, will engage in any LSC-funded activities while working as an employee of a non-LSC grantee affiliate.

6. **Signage and Disclaimers**-A "disclaimer" will be provided in writing individually to all clients, prospective clients, opposing attorneys and other visitors entering the premises of the LSC grantee affiliate and of the non-LSC grantee affiliate. The disclaimer will also be provided in writing individually to all clients and prospective clients who otherwise meet in-person with an employee of an affiliate. The written disclaimer will be printed on an 8.5 x 11 inch sheet of paper in 12 point type. It will also be published on web sites maintained by the affiliates, and in the places and manners described in the grantee-plaintiffs' April 25, 2003 proposal.

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An oral disclaimer will be made in-person, and in telephone communications, to all individual clients and prospective clients. In addition to the written disclaimers to courts and government officials provided in paragraph six of the grantee-plaintiffs' April 25, 2003 proposal, disclaimers will also be made orally to all individual judges, opposing attorneys, government officials, journalists and others who come into contact with either affiliate.

For example, South Brooklyn Legal Services and the affiliated South Brooklyn Justice Center will present the following written and oral disclaimer (or a disclaimer containing similar text to the same effect) to all clients, prospective clients, and others identified above in paragraph six:

> South Brooklyn Legal Services ("SBLS") and the South Brooklyn Justice Center (the "Justice Center") are separate, independent non-profit corporations. SBLS receives funds from the Legal Services Corporation ("LSC") to provide certain approved categories of legal assistance. Use of these funds from LSC is restricted by federal law. The Justice Center does not receive any LSC funds. Congress has refused to allow LSC funds to be used to finance the work of the Justice Center. Nevertheless, SBLS and the Justice Center cooperate to serve the legal needs of the low-income individuals and families in South Brooklyn.

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In addition, the non-LSC grantee will include the following disclaimer (or similar text to the same effect) in all client retainer agreements:

> I have read and understood the following: The South Brooklyn Justice Center (the "Justice Center") is representing me. The Justice Center does not receive any Legal Services Corporation ("LSC") funds. Congress has refused to allow LSC funds to be used to finance the work of the Justice Center.

In addition, the LSC grantee will include the following disclaimer (or similar text to the same effect) in all client retainer agreements:

> I have read and understood the following: The South Brooklyn Legal Services ("SBLS") is representing me. SBLS receives funds from the Legal Services Corporation ("LSC") to provide certain approved categories of legal assistance. Federal law restricts the use of these LSC funds and all other funds provided to SBLS.

Affiliates will produce the disclaimers in both English and Spanish, and will, pursuant to existing office policies, provide additional translation into other languages.

7. **Equipment**-The respective affiliates propose to share equipment and physical resources, including, telephone lines, computers, case management systems, libraries, legal

research facilities, office furnishings, printers, fax machines and web sites.

8. **Physical premises**-The respective affiliates propose to operate in one physical location with no physical separation beyond that degree of physical separation required of other non-profit federal grantees by Presidential Executive Order No. 13279 , 67 Fed.Reg. 77141 (Dec. 12, 2002), entitled Equal Protection of the Laws for Faith-based and Community Organizations. [Those] standards ... applied in the context of the legal services programs, would permit the LSC and non-LSC affiliates to operate in a single physical location, but would require the non-LSC grantee affiliate to provide LSC-restricted services "separately in time or location from any programs or services supported" with LSC funds.

More specifically, these standards would require, for example, that a non-LSC grantee affiliate conduct its LSC-restricted activities either in a room separate from any room in which its LSC grantee affiliate is simultaneously conducting LSC-approved activities, or in the same room but at separate times.

9. **Employee time**-The LSC and non-LSC affiliates propose to share all legal, support and supervisory personnel (including an Executive Director, who will direct both

programs). No personnel will engage in LSC-funded activities while working in the capacity as an employee of a non-LSC grantee affiliate.

10. **Intake**-The respective affiliates propose to share a common intake and allocation mechanism to refer clients and cases between the affiliates. [As noted], an individual disclaimer will be provided to each individual client or prospective client who contacts either affiliate.

LSC also rejected this proposal. *See* Office of Legal Affairs External Opinion # EX-2003-1009 ("OLA External Opinion"), attached to Letter from Stephen L. Ascher on behalf of LSC (June 24, 2003). It concluded that the proposal satisfied the first two program integrity rules (legally separate entities and no subsidization); however, it failed to meet the third (physical and financial separation) because "the proposed 100% sharing of physical space, equipment, and staffs, demonstrate that the proposal as a whole fails to provide physical and financial separation." *Id.* at 8. It viewed physical and financial separation as "the most nuanced and complex of the three factors required by the [program integrity rules,]" *id.* at 3, explaining:

> Whether physical and financial separation exists is determined on a case-by-case basis, considering the totality of the circumstances. Individual factors present in one situation might be acceptable in the context of the overall relationship between the

> entities, although they might be unacceptable in another situation in which other factors weigh more heavily against a finding of sufficient separation. Each factor weighs for or against separation. Some factors are heavy, some are light. It is the total weight of all the factors together that LSC looks at in determining the strength of the grantee's physical and financial separation from the other entity. However, in all situations the separation between the organizations must be clear to clients, courts, agencies and others with whom the recipient comes into contact, and to the general public.
>
> It is also important to note that the financial separation requirement is distinct from the non-subsidization requirement. While bookkeeping can provide evidence of a lack of subsidization, the regulation explicitly states that mere bookkeeping separation is insufficient to meet the physical and financial separation requirement.

Id.

LSC explained why, in its view, the Clarified Proposal's sharing of equipment, premises, personnel and intake demonstrated a lack of physical and financial separation:

> **Equipment:** In respect to the sharing of equipment, LSC believed that it "clearly indicates a lack of physical and financial separation" since "each grantee would essentially share one

infrastructure with a non-LSC affiliate." *Id.* at 6. It acknowledged that its rules "allow[ ] for organizations to share some equipment, such as a copier and a library," but "a complete sharing of *all* office property, including telephones, furniture, case management systems, etc., would be a heavy indicia of a lack of physical separation." *Id.* at 6-7 (emphasis in original). It recognized, however, that the sharing of costs had no bearing on the issue of subsidization. *See id.* at 7 ("Although the proposal notes that the costs of the equipment is intended to be apportioned, that aspect speaks only to subsidization, but not to physical and financial separation.").

Physical Premises: LSC also viewed this aspect of the Clarified Proposal "[a]s with the situation of equipment, . . . as having essentially one infrastructure[,]" *id.*, once again drawing a distinction between subsidization and physical and financial separation. *See id.* ("The fact that the costs of the space would be shared speaks only to subsidization but not to physical and financial separation (mere bookkeeping separation is not enough). Allowing for the two entities to operate entirely out of one physical location without any physical separation between their respective offices would directly violate the . . . requirement that they have physical and financial separation.").

Employee Time: LSC recognized that "[t]here is no *per se* bar against a recipient

employing part-time staff who are also employed part-time by an organization which engages in restricted activity[,]" but that "[a]lthough it may be consistent [with the regulations] for affiliate organizations to share *some* personnel, a 100% overlapping staff weighs heavily against true physical and financial separation." *Id.* (emphasis in original). It did not view the plaintiff-grantees' pledge that "no personnel will engage in LSC funded activities while working in the capacity as an employee of a non-LSC grantee affiliate" as "ameliorat[ing] the problem that by having completely overlapping staffs, each grantee and its affiliate appear to be essentially one organization[,]" once again recognizing that the issue was one of physical and financial separation, rather than subsidization. *See id.* at 8 ("In the same way that apportioning costs for overhead and equipment speaks only to the issue of subsidization and not to physical and financial separation, the fact that employees 'on the clock' for the grantee would not be doing any work for the affiliate, and vice versa, serves only to prevent potential subsidizations and is not sufficient to demonstrate physical and financial separation of the organizations.").

Intake: LSC did not rail against sharing a common intake and allocation mechanism; rather, its concern with the Clarified Proposal in that respect was that "[t]he only description of how the intake system will work is a statement that

> the disclaimers described in the proposal will be provided to applicants for service and clients." *Id.* LSC believed that "[a]s the point of entry for clients, a shared intake mechanism must clearly differentiate between the two entities[,]" and that the plaintiff-grantees' disclaimer proposal "[b]y itself . . . does very little to give the clients a clear experience of being directed to one of two separate organizations rather than merely being routed within one entity." *Id.*

Notably, LSC acknowledged that even if the two organizations were to share all physical premises, staff and equipment, adequate signage and disclaimers might satisfy any concerns that the public might *perceive* that the organizations were not physically and financially separate. *See id.* at 6 ("As described the signage and disclaimers would appear to indicate physical and financial separation. However, to the extent that the organizations plan to share all physical premises, equipment and staff, they would need extensive signage and other indicia of separateness to address the obvious perception that the respective organizations are not, in any but a superficial way, physically and financially separate.").

At oral argument on June 16, 2004, the Court expressed concern that the parties' extensive affidavits regarding the as-applied preliminary injunction application did not clearly present uncontested facts, and afforded them an opportunity to stipulate to the facts that they believed were relevant or, if necessary, to identify contested facts for resolution at a factual

hearing. *See* June 16, 2004 Tr. at 4-7.[6] Thereafter, the parties entered into a stipulation and advised the Court that there was no need for a hearing. *See* Letter from Anne Nacinovich on behalf of LSC (July 6, 2004) at 1 & Attach. Parties' Stipulated Facts ("Stipulation"). In the main, plaintiff-grantees identified in the Stipulation the financial burdens that LSC's rejection of their Clarified Proposal imposed upon their ability to create unrestricted alternative channels with non-federal funds. For its part, LSC identified a number of approved affiliation proposals where there was some sharing of personnel, including part-time attorneys. *See* Stipulation ¶ 12. LSC states that "sharing a substantial number or proportion of recipient staff calls the recipient's separateness into question. . . . For larger organizations, 10% of the recipient's attorney/paralegal staff should serve as a guide. However, for recipients with smaller staffs, the program director should use his or her best judgment to determine whether part-time staff constitutes a substantial proportion of the recipient's legal work-force." Stipulation ¶ 5 (citation omitted).

The Court held further oral argument on November 15, 2004 to seek, *inter alia,* clarification of what it perceived to be an inconsistency as to the degree of physical separation contemplated by the Clarified Proposal and LSC's reason for rejecting that aspect of the proposal: LSC viewed the Clarified Proposal as not providing for "any physical or financial separation whatsoever [,]" Letter from Stephen L. Ascher on behalf of LSC (June 24, 2003) at 1, even though

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6. "June 16, 2004 Tr." refers to the transcript of the oral argument held on June 16, 2004.

the plaintiff-grantees, incorporating the degree of physical separation required of other non-profit federal grantees under the President's Faith-Based Initiative Program, proposed that a non-LSC grantee affiliate would conduct its LSC-restricted activities "either in a room separate from any room in which its LSC grantee affiliate is simultaneously conducting LSC-approved activities, or in the same room but at separate times." Clarified Proposal at 5.

When this was pointed out to LSC's counsel, he agreed that "it may be possible for ... grantee affiliate[s] to enter into a situation where they have separate offices within the same building or within the same floor, as long as there is adequate signage," and that "[i]t is possible, based on the totality of the circumstances," that even adjoining rooms "would not violate the program integrity regulation." Nov. 15, 2004 Tr. at 11-12.[7] The Government's attorney went one step further, stating: "I make no distinction between next door or the floor below or the floor above. If it's a separate set of offices, that's all that's required by the regulation." *Id.* at 28-29. The LSC attorney, however, drew a line when questioned about allowing non-restricted affiliate activities to be conducted at different times in the same room as LSC-restricted activities because it "would create too much risk of confusion." *Id.* at 12.

The Government's counsel raised at this oral argument his concern that the same lawyer might be handling both LSC and non-LSC components of the same case, which he believed would be contrary to Congress' purpose "to focus

7. "Nov. 15, 2004 Tr." refers to the transcript of the oral argument held on November 15, 2004.

the LSC-funded attorneys' efforts on cases that the private sector would not handle." *Id.* at 29. Plaintiff-grantees' counsel offered to assuage this concern by stating that "if there is a significant non-LSC component in the case, it has to be handled by a non-LSC lawyer." *Id.*

DISCUSSION

A. The Tenth Amendment Challenge

Plaintiffs argue that the Act and program integrity rules violate the Tenth Amendment because they "interfere with the ability of state and local governments to provide funds to LSC grantees in an effort to improve the efficiency and fairness of important state and local institutions." Mem. Supp. Pls.' Mot. Prelim. Inj. ("Pls.' Mem.") at 47. Specifically, they contend that "state and local efforts to aid LSC grantees must either become encumbered by [LSC's] restrictions, or be expended on wasteful attempts to establish and maintain burdensome separate entities."[8] *Id.* at 48. In addition to opposing this constitutional challenge on the merits, defendants contend that none of the plaintiffs have standing.

1. Standing

Standing is a jurisdictional prerequisite that imposes both constitutional and prudential constraints on a litigant's right

8. The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

to access the courts for the resolution of judicial disputes. As the Second Circuit has explained:

> Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Article III, § 2 of the United States Constitution restricts federal courts to deciding Cases and Controversies. From this has emerged the doctrine of constitutional standing. Federal courts must determine standing at the threshold of every case. It would violate principles of separation of powers for [the Court] to hear a matter that was not a case or controversy and therefore not delegated to the federal judiciary under Article III.
>
> At an irreducible constitutional minimum, Article III standing requires that the plaintiff have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical.

State of Connecticut v. Physicians Health Servs. of Connecticut, Inc., 287 F.3d 110, 116-17 (2d Cir.2002) (internal citations, quotations and alterations omitted). "Article III standing also requires that there be a causal connection between the injury and the conduct complained of and that it is likely that the injury will be redressed by a favorable decision." *Id.* at 117 n. 7 (internal citations,

quotations and alteration omitted); *see Jenkins v. United States,* 386 F.3d 415, 417 (2d Cir.2004) ("To establish Article III standing, a plaintiff must therefore allege, and ultimately prove, that he has suffered an injury-in-fact that is fairly traceable to the challenged action of the defendant, and which is likely to be redressed by the requested relief." (internal citations and emphasis omitted)). Last, "as a prudential principle, ... plaintiff[s] generally must assert [their] own legal rights and interests, and cannot rest [their] claim to relief on the legal rights or interests of third parties." *Physicians Health Servs., Inc.,* 287 F.3d at 117 (internal citations, quotations and alteration omitted).

In *Tennessee Electric Power Co. v. Tennessee Valley Authority,* 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939), the Supreme Court "observed in passing that 'absent the states or their officers,' private parties 'have no standing ... to raise any question under the [Tenth] [A]mendment.' " *Gillespie v. City of Indianapolis,* 185 F.3d 693, 700 (7th Cir.1999) (quoting *Tenn. Elec. Power Co.,* 306 U.S. at 144, 59 S.Ct. 366). Defendants have referenced two district courts that have construed this "passing" reference as binding precedent, requiring them to reject standing. *See Medeiros v. Atlantic States Marine Fisheries Comm'n,* 327 F.Supp.2d 145, 153-54 (D.R.I.2004); *Vermont Assembly of Home Health Agencies, Inc. v. Shalala,* 18 F.Supp.2d 355, 371 (D.Vt.1998).

In the Court's view, the passing comment in *Tenn. Elec. Power Co.* is best viewed as *dicta* since the high court reached the merits. *See* Ara B. Gershengorn, *Private Party Standing to Raise Tenth Amendment Commandeering Challenges,* 100 Colum. L.Rev. 1065, 1073 (2000) (noting

that in *Tenn. Elec. Power Co.*, the Supreme Court rejected the claim on the merits, "but added in *dicta,* language that intimated that only the state could raise a Tenth Amendment commandeering claim."). As such, "a distinction should be drawn between 'obiter dictum,' which constitutes an aside or an unnecessary extension of comments, and considered or 'judicial dictum' where the Court . . . is providing a construction of a statute to guide the future conduct of inferior courts." *United States v. Bell,* 524 F.2d 202, 206 (2d Cir.1975). The passing comment by the Supreme Court in *Tenn. Elec. Power Co.* is of the "obiter dictum" variety. Even if it were "judicial dictum," it would still "not be binding," although "it must be given considerable weight and can not be ignored in the resolution of [a] close question. . . ." *Id.*

In *Gillespie,* the Seventh Circuit bypassed the issue of the weight, if any, to be accorded to the Supreme Court's "passing comment," simply noting that "standing barriers have been substantially lowered in the decades since the Supreme Court decided *Tenn[.] Elec. Power Co.," Gillespie,* 185 F.3d at 700 (internal citation omitted), and addressed the merits of the Tenth Amendment standing issue. In that regard, the circuit court commented that "a difference of opinion among the lower courts exposes the unsettled nature of the issue." *Id.; see also id.* 700 n. 3 (collating cases). This difference perdures. *Compare Dillard v. Baldwin County Comm'rs,* 225 F.3d 1271, 1276 (11th Cir.2000) (finding standing), *with United States v. Parker,* 362 F.3d 1279, 1285 (10th Cir.2004) (no standing). There is no Second Circuit authority.[9] Noticeably, other than the two district courts that

9. In *Pierce County, Washington v. Guillen,* 537 U.S. 129, 148 n. 10, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003), the Supreme Court (Cont'd)

believed they were bound by *Tenn. Elec. Power, Co.*, no other court passing upon the merits of the standing issue has mentioned that case. As reflected by *Dillard* and *Parker,* they have come to different conclusions as to whether a sufficient nexus exists between an individual and the rights protected by the Tenth Amendment to warrant standing.

The *Gillespie* court came down on the standing side, and the Court agrees, viewing *Gillespie* as providing the most reasoned decision. Its conclusion that "the Tenth Amendment, although nominally protecting state sovereignty, ultimately secures the rights of individuals," *Gillespie,* 185 F.3d at 703, was appropriately influenced by the Supreme Court's language in *New York v. United States,* 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992): "The Constitution does not protect the sovereignty of the states for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *Gillespie,* 185 F.3d at 703 (quoting *New York,* 505 U.S. at 181, 112 S.Ct. 2408).

The residual question, therefore, is whether the plaintiffs meet the constitutional and prudential standing requirements. In respect to the requisite "injury-in-fact," the Second Circuit

(Cont'd)

chose not to pass upon the expanded question of "whether private plaintiffs have standing to assert states rights under the Tenth Amendment where their States' legislative and executive branches expressly approve and accept the benefits and terms of the federal statute in question[.]"

has instructed that "marginal differences are not meaningful in assessing allegations of injury-in-fact since the injury-in-fact necessary for standing need not be large, an identifiable trifle will suffice." *New York Pub. Interest Research Group v. Whitman,* 321 F.3d 316, 326 (2d Cir.2003). With the exception of the government-donor plaintiffs, the plaintiffs have alleged, at the minimum, an "identifiable trifle" of an injury-in-fact because they each are affected in some fashion by the restrictions Congress has imposed upon a grantee's use of state and local funds; there is an obvious "causal connection between the claimed injury and the challenged conduct," and the Court would likely "be able to redress the plaintiff[s'] injuries through the exercise of its remedial powers." *Id.* at 701. Nor are there prudential obstacles to standing since these plaintiffs assert their own interests, and not simply the interests of third parties.

This is not the case, however, with the government-donor plaintiffs, who are several members of the New York City Council, a New York State Senator, and a New York State Assemblyman. Members of legislative bodies may sue to remedy injuries they personally suffer. *See, e.g., Powell v. McCormack,* 395 U.S. 486, 512-14, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) (recognizing member of Congress' standing to sue for back pay as result of the House of Representatives' refusal to seat him). Unlike the other plaintiffs, however, the government-donor plaintiffs have not articulated how they have personally suffered any injury. Legislators may also establish standing by alleging an "institutional injury" when their "votes would have been sufficient to defeat (or enact) a specific legislative Act . . . if that legislative action goes into effect (or does not go into

effect), on the ground that their votes have been completely nullified." *Raines v. Byrd*, 521 U.S. 811, 823, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). The government-donor plaintiffs make no such allegation. Nor do they allege that they have been authorized to sue on behalf of their respective legislative bodies. *See id.* at 829, 117 S.Ct. 2312 ("We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action."). Thus, the government-donor plaintiffs have not met their burden of establishing standing. *See Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d. Cir.1995) ("The burden to establish standing remains with the party claiming that standing exists.").

2. Merits

The Tenth Amendment is meant to protect the system of dual federal-state sovereignty. *See Printz v. United States*, 521 U.S. 898, 918, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) ("[T]he Constitution established a system of dual sovereignty. . . . Residual state sovereignty was . . . rendered express by the Tenth Amendment[ ]. . . ."). Accordingly, as the Second Circuit has explained, "[f]ederal statutes validly enacted under one of Congress's enumerated powers . . . cannot violate the Tenth Amendment unless they commandeer the states' executive officials, or legislative processes." *Physicians Health Servs., Inc.*, 287 F.3d at 122 (internal citations omitted).

Congress may, however, provide incentives to influence state action through its spending power without offending the Tenth Amendment. For example, over a half century ago,

the Supreme Court, in *Oklahoma v. Civil Service Commission,* 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947), in passing upon the constitutionality of the Hatch Act in the face of a Tenth Amendment challenge, held that Congress may lawfully withhold federal funding for state employees if the state did not comply with the Act. Similarly, in *South Dakota v. Dole,* 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987), the Supreme Court rejected a Tenth Amendment challenge to a federal statute that conditioned federal funding for state highways on the state's adoption of a 21-year-old drinking age. In so doing, it explained its holding in *Civil Service Commission* as follows:

> [T]he Court considered the validity of the Hatch Act insofar as it was applied to political activities of state officials whose employment was financed in whole or in part with federal funds. The State contended that an order under this provision to withhold certain federal funds unless a state official was removed invaded its sovereignty in violation of the Tenth Amendment. Though finding that the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, the Court nevertheless held that the Federal Government does have power to fix the terms upon which its money allotments to states shall be disbursed. The Court found no violation of the State's sovereignty because the State could, and did, adopt the simple expedient of not yielding to what she urges is federal coercion. The offer of benefits to a state by the United States dependent upon cooperation

> by the state with federal plans, assumedly for the general welfare, is not unusual.

483 U.S. at 210, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (internal citations and quotations omitted). *See also Hodel v. Virginia Surface Min. & Reclamation Ass'n,* 452 U.S. 264, 292 n. 33, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) ("[E]ven if it is true that the [federal statute's] requirements will have a measurable impact on Virginia's economy, this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment.").

The present case is more compelling than these precedents. The state and local governments are hardly being coerced into yielding their funds. They have full reign as to how they choose to use their monies to fund legal services for indigents, without fear of federal retribution. Thus, they may believe it wise to also limit their funding to non-restricted activities, or they may prefer to provide funding to LSC recipients for the creation of alternative channels, or they may prefer to establish their own mechanisms for rendering legal services to the poor.

The cases principally relied upon by plaintiffs in support of their Tenth Amendment challenge, *Printz v. United States,* 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), *New York,* and *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), are inapposite.

In *Gregory,* the Supreme Court simply held that the federal Age Discrimination in Employment Act was not intended to invalidate state mandatory retirement laws for

judges; therefore, the balance between federal and state powers at the heart of the Tenth Amendment was preserved since Congress chose not to interfere with the state's operations of its courts. Affording the state the option to decide whether it would be willing to use its monies to fund the restricted activities is the antithesis of federal intrusion upon state governmental operations.

New York and *Printz* simply represent two examples of proscribed "commandeering." Thus, in *Printz,* the Supreme Court determined that a federal law requiring state law enforcement officers to conduct background checks on prospective handgun purchasers violated the Tenth Amendment because it commandeered state officers to execute federal laws. 521 U.S. at 933, 117 S.Ct. 2365. And in *New York,* the Supreme Court struck down a federal law that required states to either accept ownership of radioactive waste or regulate the disposal of such waste according to federal requirements, as violative of the Tenth Amendment because Congress was "commandeer[ing] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 505 U.S. at 161, 112 S.Ct. 2408 (internal citations and quotations omitted). *New York* actually undercuts plaintiffs' Tenth Amendment challenge by noting that Congress does not "lack [ ] the ability to encourage a State to regulate in a particular way, or that Congress may ... hold out incentives to the States as a method of influencing a State's policy choices." *Id.* at 166, 112 S.Ct. 2408.

B. The Facial Challenges[10]

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10. Plaintiffs contend that their "challenges to the solicitation, attorney's fees and, class action restrictions are both as-applied and facial." Letter from Burt Neuborne on behalf of plaintiffs (Nov. 12, 2004) at 4. With respect to solicitation, plaintiffs allege that SBLS and LSNY would like to engage in such activity, that FWLS does engage in such activity, and that "[t]he solicitation restriction is one of several restrictions that prompted [FWLS] to reject LSC funding, and it has prevented the program from reapplying for LSC funding." *Id.* They allege that the class-action restriction has prevented SBLS "from bringing a class action on behalf of child care providers against the City of New York seeking money owed to them under a child care reimbursement program," *id.* at 5, and that "as a result of the attorneys' fee award restriction, SBLS has not been able to claim an attorneys' fee award on its client's behalf." *Id.* With respect to the latter two restrictions, plaintiffs purport that they "function 'as applied,' in the context of particular cases, to limit attorney speech in a manner that warps the proper operation of the judiciary." Pls.' Mem. at 60. Despite plaintiffs' use of an as-applied label, their argument involving distortion of the legal system is substantively a facial challenge, which is addressed fully below. The Court also notes that unlike their as-applied challenges to the program integrity rules, plaintiffs have offered only minimal and largely speculative facts in support of their so-called as-applied challenges to these three restrictions. Finally, plaintiffs' assertion that they have been unable to solicit clients, engage in class actions or pursue attorney's fees is subsumed in their as-applied challenges to the program integrity rules. *See* Nov. 15, 2004 Tr. at 52 (in which plaintiffs' acknowledged that their as-applied challenge to the class-action restriction "implicates the rest of the conversation about the affiliate programs."). Since plaintiffs have not mounted separate viable as-applied challenges to the solicitation, attorney's-fees and class-action restrictions, the Court addresses only plaintiffs' facial challenges to these restrictions.

Appendix C

1. Conceptual Analysis

The facial challenges to the class-action, attorney's-fees and solicitation restrictions require focused analyses of the decisions of the Second Circuit in *Velazquez II* and the Supreme Court in *Velazquez III,* as well as the Supreme Court's decision subsequent to *Velazquez III* in *United States v. American Library Ass'n,* 539 U.S. 194, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003), addressing its holding in *Velazquez III*.

a. The District Court's Decision (*Velazquez I*)

Initially, it is useful to begin by revisiting the precise issues raised and adjudicated by this Court in *Velazquez I.* The Court first noted that the final program integrity rules were designed to salvage the constitutionality of the Act's restrictions by affording the plaintiffs the opportunity to establish affiliate organizations, and culled from the parties' numerous submissions that, in addition to the due process and equal protection challenges,

> the following issues [were] fairly presented to the Court in the context of plaintiffs' preliminary injunction application: (1) can the LSC lawfully adopt regulations to guard against the appearance that the Government endorses the prohibited activities; (2) if so, are the regulations enacted by the LSC, specifically the 'separate personnel' and 'degree of separate facilities' program integrity requirements, properly drawn to address that interest considering the differences, such as they

> are, between the Title X proscriptions in *Rust [v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991)] and the impact in this case on the legal profession and the attorney-client relationship[.]

Velazquez I, 985 F.Supp. at 337.

The Court answered each of these questions in the affirmative. In respect to the first question, it held that LSC's program integrity rules were, under *Chevron USA, Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), a permissible construction and implementation of the Act. As for the second question, it held that the rules could not be struck down as facially unconstitutional. In that regard, the Court noted, initially, that "when dealing with an interest that is viewpoint neutral and not aimed at suppressing vital, fundamental constitutional rights, the Government need only show a 'fit' between the legislature's ends and the means chosen to accomplish these ends .. . that employs not necessarily the least restrictive means but .. . a means narrowly tailored to achieve the desired objective." *Velazquez I,* 985 F.Supp. at 340 (citations and quotations omitted; alterations in original). The Court viewed that as "the proper standard to apply when evaluating whether regulations are properly drawn to protect the Government's interest in avoiding the perception of endorsement of programs which it does not subsidize," *id.,* and held that the program integrity rules met that standard because they were neither vague nor overbroad; moreover, plaintiffs did not demonstrate that they never could be applied in a valid manner. As it explained, quoting from *Rust:*

"A facial challenge ... is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid." *Id.* at 341 (internal citation omitted).

In the course of rejecting the facial challenge to the program integrity rules, the Court disagreed with plaintiffs' contention "that the profanity of the lawyering restrictions here at issue ... affect the fundamental nature of lawyering and the attorney-client relationship[,]" *id.* at 342, since the Court did not view the restrictions as "significantly imping[ing]" on this relationship because under LSC's regulations the grantee-lawyer "may counsel the client, refer the client to another attorney, and explain to the client that LSC restrictions preclude the lawyer from engaging in the activity the client may wish to undertake." *Id.* at 343. The Court cautioned, however, that it would take "a critical view" of "any restrictions on ... basic lawyering" and "any unreasonable rejections of recipients' certificates of compliance with the program integrity requirements, if such issues should arise in any future 'as applied' litigation." *Id.* at 343-44.

b. The Circuit Court's Decision (*Velazquez II*)

On appeal, plaintiffs renewed their *Chevron* and facial challenges to the program integrity rules. In addition, they

raised facial challenges to a number of the Act's restrictions.[11] The circuit court unanimously rejected plaintiffs' *Chevron* argument-that LSC was not authorized by Congress to allow for the creation of affiliate organizations as alternative channels for the unrestricted use of non-LSC funds, and that the program integrity rules did not represent a permissible construction of the Act; therefore, it affirmed the district court in that respect. *See Velazquez II,* 164 F.3d at 763-64.

Prior to addressing the facial challenge to the program integrity rules, the circuit court unanimously declined plaintiffs' invitation to determine whether the traditional lawyer-client relationship enjoyed constitutional protection because it determined, as did the district court, that "grantee lawyers are bound to explain to prospective and actual clients the limitations imposed by the 1996 restrictions, and may refer clients to lawyers unencumbered by the restrictions"; consequently, there was "no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of legal services." *Id.* at 764.

Turning to the program integrity rules, the circuit court unanimously concluded, as did the district court, that they were not facially unconstitutional. In doing so, it rejected plaintiffs' unconstitutional-conditions argument "that the program integrity rules contained in the final regulations unreasonably burden a grantee's ability to use nonfederal funds," because it construed the leading unconstitutional-

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11. The district court did not identify these facial challenges as being presented by plaintiffs' preliminary injunction motion; accordingly it did not address them.

conditions cases- *Regan v. Taxation With Representation,* 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (*"TWR"*), *FCC v. League of Women Voters,* 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984), and *Rust*-to stand for the proposition that "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Id.* at 766. In so holding, it viewed *Rust* as the least relevant because there "the speech restriction" was "very narrow; it was limited to speech at odds with the values Congress was seeking to advance through its grant program[,]" noting that the Supreme Court, in commenting on *Rust* in *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), explained that "[w]hen the government disburses public funds to private entities to convey a governmental message, it may ... ensure that its message is neither garbled nor distorted by the grantee." *Velazquez II,* 164 F.3d at 766 (quoting *Rosenberger,* 515 U.S. at 833, 115 S.Ct. 2510).

The circuit court reasoned, therefore, that *Rust* was "unlike the present case" because "[t]he restrictions here placed on grantees are not narrow; they are extremely broad" since "[g]rantees are prohibited outright from engaging in attempts to influence government's adoption of laws[,]" and "the justification that prevailed in *Rust*-avoiding the distortion or dilution of the very government message advanced by the program"-did not "have any bearing here." *Id.* Consequently, the court did not believe that *Rust* "compelled the conclusion that the program integrity rules[,]" although modeled after those in *Rust*, "necessarily allow

adequate avenues for protected expression in statutory or factual contexts where the burden on speech may be more significant or where the relationship between the burden and the government benefit may be more attenuated." *Id.*

Nonetheless, the circuit court rejected plaintiffs' facial challenge to the program integrity rules because plaintiffs "failed to establish that no set of circumstances exists under which the Act would be valid," *id.* at 767 (internal citation and quotations omitted), since "[i]t appears likely that LSC grantees with substantial non-federal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty." *Id.*

The circuit court then addressed plaintiffs' final claim-"that the Act discriminates against certain speech on the basis of viewpoint and is therefore unconstitutional even as applied to the use of federal monies." *Id.* The court gleaned from the plaintiffs' submissions that it "appear[ed] that plaintiffs direct[ed] this argument against the lobbying provisions and the welfare reform provision of the Act." *Id.*

In respect to the lobbying restrictions, which encompassed legislation, agency-adjudication and executive-order restrictions, the court unanimously concluded that they were "based on subject matter, not viewpoint[,]" and that "Congress may discriminate on the basis of the subject matter of grantees' expression, because such discrimination properly confine[s the LSC program] to the limited and legitimate purposes for which it was created." *Id.* at 768 (internal citation and quotations omitted; alterations in original). As for the legislation component, the court explained that

"[w]hile this language imposes a sweeping restriction on grantee activity, it burdens no particular viewpoint and favors neither speech in support of legislative action nor speech opposed[ ]" because "it prohibits the grantee from attempt[ing] to influence *the passage or defeat* of a legislative or constitutional initiative [.]" *Id.* (citation and quotations omitted; alterations and emphasis in original). The court applied the same logic to the agency-adjudication aspect of the lobbying restrictions, finding it viewpoint neutral because "the restriction permits grantees to participate on neither side of a rule-creating adjudicatory proceeding." *Id.* As for the executive-order restriction, the court interpreted it to simply "define a limitation on program content, without favoring policy continuity over change or otherwise discriminating against any viewpoint[,]" *id.;* consequently, it "d[id] not suppress ideas but merely prohibit[ed] a project grantee ... from engaging in activities outside the project's scope." *Id.* (internal citations and quotations omitted; alterations in original).

Turning to the welfare-reform restriction, section 504(a)(16) of the Act, the court noted that it contained four categories of prohibited activities "involving an effort to reform a Federal or State welfare system[.]" *Id.* The court unanimously found all of them viewpoint neutral because they did not distinguish between those who supported or opposed any proposed reform. *See id.* at 769.

There was, however, another aspect of the welfare-reform restriction that split the court. It provided that a grantee may represent "an eligible client who is seeking relief from a welfare agency[,]" but only if "such relief does not involve

an effort to amend or otherwise challenge existing law in effect on the date of the initiation of representation. . . ." *Id.* The majority held that this "suits-for-benefits" exception was not viewpoint neutral because "[i]t accords funding to those who represent clients without making any challenge to existing rules of law, but denies it to those whose representation challenges existing rules." *Id.* at 769-70. Noting that "different types of speech enjoy different degrees of protection under the First Amendment [,]" *id.* at 771, it reasoned that "a lawyer's argument to a court that a statute, rule, or governmental practice standing in the way of a client's claim is unconstitutional or otherwise illegal falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art[,]" *id.*, viewing this as analogous to a prohibition "calculated to drive certain ideas or viewpoints from the marketplace" because "[i]t muzzles grant recipients from expressing any and all forbidden arguments." *Id.* at 772 (internal citation omitted). Because this provision was viewpoint discrimination, it was subject to "strict First Amendment scrutiny," which it could not survive. *Id.*

Although the circuit court gave content to the concept of viewpoint neutrality in passing upon the constitutionality of the lobbying and welfare-reform restrictions, it did not apparently address any of the three restrictions which plaintiffs now facially challenge to determine if they were viewpoint based, or otherwise constitutionally infirm.[12]

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12. LSC contends that the circuit court passed upon plaintiffs' challenges to these three restrictions because the court listed in a footnote certain restrictions that plaintiffs "do not challenge[,]" and (Cont'd)

c. The Supreme Court's Decision (*Velazquez III*)

The constitutionality of the "suits-for-benefits" exception to the welfare-reform restriction was the only issue before the Supreme Court. The 5-4 majority affirmed the circuit court's holding that it constituted viewpoint discrimination. Echoing the circuit court's take on *Rust*, it explained that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government used private speakers to transmit specific information pertaining to its own program[,]" *Velazquez III,* 531 U.S. at 541, 121 S.Ct. 1043, invoking, as did the circuit court, its holding in *Rosenberger,* that "when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Id.* (quoting *Rosenberger,* 515 U.S. at 833, 115 S.Ct. 2510).

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excluded these three restrictions from its list because it somehow "understood that the plaintiffs were challenging much, much more than just the lobbying restriction[.]" Nov. 15, 2004 Tr. at 44. This conclusion is not warranted. Although the footnote in question explained that plaintiffs "do not challenge" restrictions on "activity involving political redistricting" and "litigation with respect to abortion[,]" *Velazquez II,* 164 F.3d at 760 n. 2 (internal citations and quotations omitted), as noted, with respect to viewpoint discrimination, the circuit court explicitly stated that "it appears that plaintiffs direct this argument against the lobbying provisions and the welfare reform provisions of the Act." *Id. at 767.* Thus, it does not appear that the circuit court believed that plaintiffs' argument that the class-action, attorney's-fees and solicitation restrictions are viewpoint based was before it.

It reasoned, conversely, that "[n]either the latitude for government speech nor its rationale applies to subsidies for private speech . . . when the government does not itself speak or subsidize transmittal of a message it favors. . . ." *Id.* at 542, 121 S.Ct. 1043 (internal citations and quotation omitted).

The Supreme Court held that the LSC program, unlike the program in *Rust*, was "designed to facilitate private speech, not to promote a governmental message[,]" because "an LSC-funded attorney speaks on the behalf of the client[,]" not the Government, *id.;* therefore, "[t]he advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept." *Id.* at 542-43, 121 S.Ct. 1043. As it further explained: "There can be little doubt that the LSC Act funds constitutionally protected expression; and in the context of this statute there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives." *Id.* at 548, 121 S.Ct. 1043.

Having concluded that the challenged restriction could not be upheld on the basis that the Government was the speaker or the sponsor of a programmatic message, the Court reasoned:

> The private nature of the speech involved here, and the extent of LSC's regulation of private expression, are indicated further by the circumstance that the Government seeks to use

> an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning. Where the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations.

Id. at 543, 121 S.Ct. 1043.

The Court therefore drew analogies from limited forum caselaw because the subsidization of legal services entities "presumes that private nongovernmental speech is necessary, and a substantial restriction is placed upon that speech." *Id.* at 544, 121 S.Ct. 1043. Turning to the challenged "suits-for-benefits" exception to the welfare-reform restriction, the Court explained:

> By providing subsidies to LSC, the Government seeks to facilitate suits for benefits by using the state and federal courts and the independent bar on which those courts depend for the proper performance of their duties and responsibilities. Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys in much the way broadcast systems or student publication networks were changed in th[ose] limited forum cases we have cited. Just as government in those cases could not elect to use a broadcasting network or a

> college publication structure in a regime which prohibits speech necessary to the proper functioning of those systems, it may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary."

Id. (internal citations omitted).

Notably, the Court elicited a concession from the Government that "upon determining a question of statutory validity is present in any anticipated or pending case or controversy, the LSC-funded attorney must cease representation at once"; moreover, "[t]his [was] true whether the validity issue bec[a]me [ ] apparent during initial attorney-client consultation or in the midst of litigation proceedings" so that if "a judge were to ask an LSC attorney whether there was a constitutional concern, the LSC attorney simply could not answer." *Id.* at 544-45, 121 S.Ct. 1043. Therefore, "the restriction . . . threaten[ed] severe impairment of the judicial function" because it "sift[ed] out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry[,]" resulting in "two tiers of cases." *Id.* at 546, 121 S.Ct. 1043. The Court concluded that "[a] scheme so inconsistent with accepted separation-of-powers principles [was] an insufficient basis to sustain or uphold the restriction on speech" because "[t]he statute [was] an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider." *Id.*

The Court viewed this restriction on speech as "even more problematic" because in cases where the attorney [would have to] withdraw[,] the client [was] unlikely to find other counsel[,]" *id.;* thus, "[t]here often w[ould] be no alternative source ... to receive vital information respecting constitutional and statutory rights bearing upon claimed benefits[,]" meaning that "with respect to the litigation services Congress has funded, there [would be] no alternative channel for expression of the advocacy Congress seeks to restrict." *Id.* at 546-47, 121 S.Ct. 1043. In sum, the Court concluded:

> Congress was not required to fund an LSC attorney to represent indigent clients; and when it did so, it was not required to fund the whole range of legal representations or relationships. The LSC and the United States, however, in effect ask us to permit Congress to *define the scope of the litigation it funds to exclude certain vital theories and ideas.* The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge.... Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.

Id. at 548-49, 121 S.Ct. 1043 (emphasis added).

Plaintiffs construe *Velazquez III* as bringing within the sweep of impermissible viewpoint-based restrictions on private speech the distortion of the legal system through

curtailment of the traditional role of lawyers and impairment of the judicial function. *See* Pls.' Mem. at 8. They argue that the class-action, attorney's-fees and solicitation restrictions distort the legal system and, therefore, must be struck down under the First Amendment.

The proper reading of *Velazquez III* and the breadth of its reach has divided legal commentators. Some have interpreted it narrowly as simply holding that traditional viewpoint-based restrictions are improper when the Government does not itself speak or subsidize a particular message.[13] Others read it more broadly as creating a new "distortion doctrine."[14] Still others see it as resting on a

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13. *See, e.g.*, Shirley K. Garcia, Case Notes, *Legal Services Corporation v. Velazquez: A Correct Application of the U.S. Supreme Court's First Amendment Limited Public Forum Analysis*, 24 U. Haw. L.Rev. 331, 344 (2001) ("The decision reaffirmed the Court's traditional position that viewpoint-based discrimination against private speech, regardless of the forum, is presumptively unconstitutional."); Jeffrey VanHoorweghe, Comment, *Legal Services Corporation v. Velazquez: The Supreme Court's Missed Opportunity to Clarify the Viewpoint Discrimination Doctrine's Role in Subsidized Speech Cases*, 50 Cath. U.L.Rev. 539, 579 (2001) ("[I]f the government is not speaking, but funding private speech, viewpoint-based restrictions are not valid.").

14. *See, e.g.*, Christopher A. Gozdor, Note, *Legal Services Corporation v. Velazquez: A Problematic Commingling of Unconstitutional Conditions and Public Fora Analyses Yields a New Grey Area for Free Speech*, 61 Md. L.Rev. 454, 468 (2002) (interpreting the holding as "subsidies for private speech violate free speech rights when the government attempts to control an existing medium of expression in ways which distort its usual functioning."

(Cont'd)

combination of traditional viewpoint analysis and distortion analysis.[15]

d. The Supreme Court's Decision in *American Library Ass'n*

The import of the language in *Velazquez III* addressing the distortion of the legal system was recently debated by the Supreme Court in *American Library Ass'n,* which involved a First Amendment challenge to the Children's Internet Protection Act's requirement that public libraries use Internet filters as a condition for the receipt of federal subsidies. Plaintiffs there relied on *Velazquez III* to support their contention that the filtering requirement imposed unconstitutional conditions that "[d]istor[t] the [u]sual

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(internal quotations omitted)); Christian Hammond, Comment, *The Supreme Court's Decision in Legal Services Corporation v. Velazquez and the Analysis Under the Unconstitutional Conditions Doctrine, 79 Denv. U.L.Rev. 157, 169 (2001)* (arguing that instead of following traditional viewpoint analysis, "the majority relied on the imprecise theory that the 'suit-for-benefits' restriction distorted the role of attorneys in the judicial system.").

15. *See, e.g.*, Carrie S. Bernstein, Comment, *Legal Services Corporation v. Velazquez: The Court's Missed Opportunity to Clarify the Legal Framework for Examining the Constitutionality of Government Program Restrictions,* 79 Denv. U.L.Rev. 137, 145-46 (2001) (concluding that the Court struck down the "suits-for-benefits" provision both because "[v]iewpoint based restrictions are improper when the government program was designed to facilitate private speech[,]" and because of "[t]he important role lawyers play in society[.]")

[f]unctioning of [p]ublic [l]ibraries." *American Library Ass'n*, 539 U.S. at 213, 123 S.Ct. 2297 (alteration in original). In rejecting this argument, the four-judge plurality advanced a narrow reading of *Velazquez III*:

> In *Velazquez*, the Court concluded that a Government program of furnishing legal aid to the indigent differed from the program in *Rust* '[i]n th[e] vital respect' that the role of lawyers who represent clients in welfare disputes is to advocate *against* the Government, and there was thus an assumption that counsel would be free of state control. The Court concluded that the restriction on advocacy in such welfare disputes would distort the usual functioning of the legal profession and the federal and state courts before which the lawyers appeared. Public libraries, by contrast, have no comparable role that pits them against the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance.

Id. (internal citation omitted; alterations and emphasis in original).[16] Because it viewed the key issue in *Velazquez III* as advocacy against the Government, the plurality concluded that "Velazquez held only that viewpoint-based restrictions are improper when the [government] does not itself speak or subsidize a message it favors *but instead expends funds to encourage a diversity of views from private speakers.*" *Id.*

16. The four justices who made up the plurality in *American Library Ass'n* were the dissenters in *Velazquez III*.

at 213 n. 7, 123 S.Ct. 2297 (internal citation and quotations omitted; alterations and emphasis in original).

Justice Kennedy and Justice Breyer filed separate concurring opinions; Justice Stevens and Justice Souter filed separate dissenting opinions, with Justice Ginsburg joining Justice Souter's opinion. Neither Justice Kennedy nor Justice Breyer in their concurring opinions, nor Justice Souter in his dissenting opinion, mentioned *Velazquez III*. Justice Stevens argued in his dissenting opinion that the filtering requirement was an impermissible attempt by the Government "to impose controls on an important medium of expression [,]" citing *Velazquez III* for the proposition that "when the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning, the distorting restriction must be struck down under the First Amendment." *Id.* at 227-28, 123 S.Ct. 2297 (internal quotations omitted). Justice Stevens therefore took issue with "the plurality's narrow reading" of *Velazquez III*, commenting that " *Velazquez* is not limited to instances in which the recipient of Government funds might be 'pit[ted]' against the Government. To the contrary, we assessed the issue in *Velazquez* by turning to, and harmonizing it with, our prior unconstitutional condition cases in the First Amendment context." *Id.* at 228 n. 5, (internal citation omitted; alterations in original).

Prior to the November 15, 2004 oral argument, the Court instructed the parties to address the standard to be applied to plaintiffs' facial challenges in light of the references in *American Library Ass'n* to *Velazquez III*. *See* Order dated Nov. 8, 2004 at 6-7. Plaintiffs responded that "[i]n *American*

Library Association, the plurality and dissenting opinions disagree whether [*Velazquez III*] extends to librarians' speech. That disagreement has no bearing on the instant case because the plaintiffs here are lawyers, not librarians, and so *Velazquez* [*III*] clearly applies to them." Letter from Burt Neuborne on behalf of plaintiffs (Nov. 12, 2004) at 3 (internal citation omitted). Furthermore, plaintiffs questioned whether the plurality's discussion of *Velazquez III* had any controlling effect because it was "only one of several concurring opinions, each unable to attract a majority of the Court"; thus, the holding should be viewed as the position "taken by Justice Kennedy," because that was the "position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* Consequently, as shown by the following colloquy at oral argument, plaintiffs maintained their position that *Velazquez III* should be read to broaden the definition of viewpoint-based regulation of speech to include restrictions that distort the legal system:

> THE COURT: And the question is how do we assess viewpoint neutrality? I read your papers as suggesting that if there's an imposition upon the legal function or the Court's function or lawyering in the broader sense of the word, that means that this is no longer viewpoint neutral. I think that's what you're trying to tell me here in your submissions. Do I read you correctly?
>
> MR. NEUBORNE: I think that's a fair summary of it. When one lawyer-in a courtroom with two adversary lawyers fighting with each other, when the effect of a government restriction is to

> significantly restrict the ability of one of the lawyers to utilize the traditional tools of lawyering, that inevitably skews the outcome of the case.

Nov. 15, 2004 Tr. at 37.

With respect to *American Library Ass'n*, the Court agrees with plaintiffs that because no single rationale enjoyed the assent of five justices, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). In his concurrence, Justice Kennedy concluded that "there is little to this case" because libraries have the capacity to unblock Web sites and disable filters; therefore, "an adult user's election to view constitutionally protected Internet material" was not burdened in any "substantial way." *American Library Ass'n*. The plurality agreed, noting that "[a]ssuming that . . . erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled." *Id.* at 209, 123 S.Ct. 2297. Thus, aside from the narrow holding that the filtering scheme was saved from any constitutional infirmity by a librarian's ability to turn off filters, the most the Court can glean from *American Library Ass'n* is that four justices took a very narrow reading of the holding in *Velazquez III*, limited to instances in which the recipient of government funds was pitted against the government, while one justice took the broad reading propounded by plaintiffs.

Appendix C

Based on its own close reading of *Velazquez III,* the Court is constrained to reject plaintiffs' broad interpretation. As an initial matter, the "suits-for-benefits" restriction fell squarely within the traditional definition of viewpoint-based regulation of speech. Tellingly, the Supreme Court significantly relied on *Rosenberger* in striking down that provision. *See Velazquez III,* 531 U.S. at 541-43, 121 S.Ct. 1043. In *Rosenberger,* the Court explained that a regulation will be deemed to be viewpoint based "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction" on speech. *Rosenberger,* 515 U.S. at 829, 115 S.Ct. 2510. The "suits-for-benefits" restriction prohibited LSC attorneys from advancing a specific ideology, opinion or perspective; under this restriction, the LSC attorney was free to represent an indigent client if he or she was willing to accept the validity of the welfare law under which the client's claim was brought, but the attorney was prohibited from representing the same client if the claim involved a challenge to the constitutionality of the welfare law. Thus, when the Supreme Court in *Velazquez III* referenced the distortion of the legal system, it had no need to broaden the traditional definition of viewpoint-based regulation of speech because the "suits-for-benefits" restriction fit neatly within that definition. Instead, the majority opinion raised the specter of distortion only to bolster its characterization of LSC grantees' speech as private speech and to highlight the extent to which that private speech was being regulated. *See Velazquez III,* 531 U.S. at 543, 121 S.Ct. 1043 ("The private nature of the speech involved here, and the extent of LSC's regulation of private expression, *are indicated further* by the circumstance that the Government seeks to use an existing medium of expression and to control

it, in a class of cases, in ways which distort its usual functioning." (emphasis added)). Accordingly, the Court will apply traditional viewpoint analysis to plaintiffs' facial First Amendment claims.

To prevail on these challenges, plaintiffs "must prove that the restrictions . . . at least implicate [their] constitutional rights." *Legal Aid Society of Hawaii v. Legal Services Corp.*, 961 F.Supp. 1402, 1408 (D.Haw.1997) ("*LASH I*"). In the context of a government subsidy, if a restriction implicates First Amendment activities, the Government may nonetheless restrict a grantee's ability to engage in such activities, so long as it allows for adequate alternative channels. *See, e.g., Legal Aid Society of Hawaii v. Legal Services Corp.*, 145 F.3d 1017, 1025 (9th Cir.1998) ("*LASH III*") ("[T]he LSC regulations do not force a recipient to give up prohibited activities, they merely require that the [grantee] keep such activities separate and distinct from [LSC] activities." (internal citations and quotations omitted)).

However, as *Velazquez III* teaches, even when adequate alternative channels are provided for, a restriction on private speech may be struck down if it is viewpoint based. In *Velazquez III*, the Supreme Court analyzed the LSC program under both its "unconstitutional-conditions" and "limited-public-forum" lines of authority. Under the unconstitutional-conditions cases, a government exemption must be "rational" and may not "aim [ ] at the suppression of dangerous ideas." *Boy Scouts of America v. Wyman*, 335 F.3d 80, 91-92 (2d Cir.2003) (quoting *TWR*, 461 U.S. at 540, 103 S.Ct. 1997) (alterations in original). Under limited-public-forum caselaw, "[r]estrictions on speech not within the type of expression

allowed ... must only be reasonable and viewpoint neutral." *Make The Road by Walking, Inc. v. Turner,* 378 F.3d 133, 143 (2d Cir.2004).[17] Thus, whether they are viewed as unconstitutional conditions on the LSC subsidy or as denying access to a limited public forum, the class-action, attorney's-fees and solicitation restrictions will survive plaintiffs' facial challenges, even if they implicate First Amendment rights, if they are viewpoint neutral and reasonable. *See Wyman,* 335 F.3d at 92 ("The case before us lies at the intersection of [the non-public-forum and unconstitutional-conditions] lines of authority and it makes no difference under which line we analyze it. Whether viewed as denial of access to a nonpublic forum or as the denial of a government benefit, the ... exclusion is constitutional if and only if it was (1) viewpoint neutral and (2) reasonable."). As noted, under *Rosenberger,* a restriction is not viewpoint neutral if "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction [ ]" on speech. 515 U.S. at 829, 115 S.Ct. 2510.

2. Class-Action Restriction

The Act prohibits LSC from funding any organization "that initiates or participates in a class action suit." § 504(a)(7). LSC's implementing regulations provide, *inter*

17. A limited public forum arises "where the government opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects." *Turner,* 378 F.3d at 143 (citations and quotations omitted). The requirement that restrictions on speech be viewpoint neutral and reasonable applies in both limited public and non-public fora. *See id.*

alia, that "[r]ecipients are prohibited from initiating or participating in any class action." 45 C.F.R. § 1617.3.

With respect to whether the class-action restriction implicates First Amendment rights, in *LASH I* the court "question[ed] whether the First Amendment right to associate for the purpose of engaging in litigation as a form of political expression extends to class actions." *LASH I,* 961 F.Supp. at 1410. Because "[n]o appellate court has previously extended First Amendment protections to class actions despite encouragement from scholars[,]" the *LASH I* court found it "imprudent to constitutionalize the rules of civil procedure" by recognizing a First Amendment right to engage in class actions. *Id.* Legal commentators have, however, suggested that the class-action mechanism confers substantive rights worthy of constitutional protection. *See, e.g.,* John Leubsdorf, *Constitutional Civil Procedure,* 63 Tex. L.Rev. 579, 617 (1984).

Assuming that the class-action restriction implicates First Amendment rights, it can fairly be argued that the restriction has a significant impact on the legal system and, in particular, on core functions of the courts. For example, the restriction will result in issues being presented to the courts in a piecemeal manner in multiple, individual cases rather than being economically presented in a single action. Nonetheless, in light of the Court's interpretation of *Velazquez III,* it is constrained to reject plaintiffs' argument that the restriction is impermissibly viewpoint based because it distorts the legal system. Nor have plaintiffs demonstrated how, under *Rosenberger's* formulation of viewpoint-based regulation of speech, the restriction targets the "specific motivating

ideology or the opinion or perspective of the speaker." 515 U.S. at 829, 115 S.Ct. 2510. Accordingly, the Court concludes that the class-action restriction is viewpoint neutral.

So long as it is viewpoint neutral, a restriction "need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *Wyman,* 335 F.3d at 97 (citation and quotations omitted). As LSC explained in its commentary to the regulation implementing the class-action restriction, "[t]he legislative history of [§ 504(a)(7)] indicates an intent that legal services programs should focus their resources on the representation of individual poor clients and not be involved in any class actions." *Class Actions,* 61 Fed.Reg. 63,754 (1996); *see also* H.R.Rep. No. 104-196 (1995) at *120 (In discussing justifications for the class-action and other restrictions, the Committee "understood that advocacy on behalf of poor individuals for social and political change is an important function in a democratic society," but did "not believe that such advocacy is an appropriate use of Federal funds," noting that "there are hundreds of private organizations which can and do fulfill this advocacy role ... [and] any funding devoted to advocacy is funding taken away from basic legal assistance."). In light of this legislative intent, the Court cannot conclude that the class-action restriction is unreasonable.

3. Attorney's-Fees Restriction

Section 504(a)(13) of the Act proscribes the use of federal subsidies to provide financial assistance to an entity "that claims (or whose employee claims), or collects and retains, attorney's fees pursuant to any Federal or State law

permitting or requiring the awarding of such fees." LSC's implementing regulations provide, *inter alia*, that "no recipient or employee of a recipient may claim, or collect and retain attorneys' fees in any case undertaken on behalf of a client of the recipient." 45 C.F.R. § 1642.3.

Attorney's fees are largely a creature of statute, and it is difficult to conceptualize how the attorney's-fees restriction implicates First Amendment rights. Nonetheless, assuming that it does, plaintiffs' argument that the restriction is viewpoint based because it "warp[s] the judicial process," Pls.' Mem. at 66, is unavailing under the Court's interpretation of *Velazquez III*, and plaintiffs have not shown how the restriction targets a particular ideology, opinion or perspective. Accordingly, the Court deems it to be viewpoint neutral.

Nor have plaintiffs shown the attorney's-fees restriction to be unreasonable. In proposing the restriction, the House Committee noted:

> Federally-funded legal aid programs should serve as a catalyst, not a replacement, for private bar activity. The Committee believes that cases which provide an opportunity for the collection of attorneys fees can be serviced by the private bar. Further, the Committee notes that [LSC] grantees are supported by public resources in order to provide free legal aid to their clients. Therefore, the Committee believes it is inappropriate for attorneys fees to be collected for free legal aid.

H.R.Rep. No. 104-196 at *120. In light of this legislative intent to have LSC-funded attorneys focus on cases that would not otherwise be pursued by the private bar, the Court cannot say that the attorney's-fees restriction is unreasonable.

4. Solicitation Restriction

Under the Act, LSC grantees must agree that they "will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action, and will not refer such nonattorney to another [grantee] or an employee of the [grantee], that is receiving financial assistance provided by the Corporation." § 504(a)(18). LSC's implementing regulations provide, *inter alia*, that "[r]ecipients and their employees are prohibited from representing a client as a result of in-person unsolicited advice." 45 C.F.R. § 1638.3(a). Under this regulation, "in-person" is defined as a "face-to-face encounter or a personal encounter via other means of communications such as a personal letter or telephone call." 45 C.F.R. § 1638.2(a). "Unsolicited advice" is defined as "advice to obtain counsel or take legal action given by a recipient or its employee to an individual who did not seek the advice and with whom the recipient does not have an attorney-client relationship." 45 C.F.R. § 1638.2(b). These regulations permit certain community legal education activities. In particular, § 1638.4 allows grantees to

> provid[e] information regarding legal rights and responsibilities or provid[e] information regarding the recipient's services and intake procedures through community legal education activities such

> as outreach, public service announcements, maintaining an ongoing presence in a courthouse to provide advice at the invitation of the court, disseminating community legal education publications, and giving presentations to groups that request them ...

and to represent individuals seeking legal assistance as a result of providing such information.

With respect to whether the solicitation restriction implicates the First Amendment, the Court notes, initially, that plaintiffs greatly overstate the restriction's reach. Although plaintiffs contend that the restriction prevents grantees from engaging in "outreach to disadvantaged persons, educating those individuals and families about their legal rights and remedies, and then offering to represent them for free," Pls.' Mem. at 54, the regulations explicitly permit such activities. *See* 45 C.F.R. § 1638.4. Although the impact on plaintiffs' First Amendment rights is less far-reaching than plaintiffs suggest, *In re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), and *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), recognize that solicitation of prospective litigants by nonprofit organizations that engage in litigation as a form of political expression and association is expressive and associational conduct entitled to First Amendment protection. *See In re Primus,* 436 U.S. at 421-24, 98 S.Ct. 1893; *Button,* 371 U.S. at 429-30, 83 S.Ct. 328.

Although the solicitation restriction implicates the First Amendment, it is nonetheless viewpoint neutral. As with their

arguments regarding the class-action and attorney-fee's restrictions, plaintiffs' argument that the solicitation restriction is viewpoint based because it distorts the legal system, *see* June 16, 2004 Tr. at 37, is unavailing. Plaintiffs also argue that the restriction is viewpoint based because "the lawyer can receive the government funding only if the lawyer has abstained from advising [a] client to enforce his legal rights," Pls.' Mem. Reply Gov't's Opp. Prelim. Inj. ("Pls.' Reply Mem.") at 52. Whether a lawyer has advised a client of his or her rights is different from targeting a particular ideology, opinion or perspective.

With respect to reasonableness, the solicitation restriction was intended to ensure that LSC grantees focus on providing core legal services to their clients rather than on spending time trying to solicit new clients. *See* H.R.Rep. No. 104-196 at *121 ("[T]he Committee finds it unacceptable for any Federally-funded legal aid program to solicit clients at a time when [LSC] and the legal aid community continue to testify that they must turn away eligible clients away due to lack of resources."). Given this legislative intent, the Court cannot say that the solicitation restriction is unreasonable.

C. The As-Applied Challenges

1. Standing

LSC challenges the plaintiff-grantees' standing to bring their as-applied challenges to the program integrity rules.

As a general rule, to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to

the challenged policy. This threshold requirement for standing may be excused only where a plaintiff makes a substantial showing that application for the benefit would have been futile." *Prayze FM v. FCC,* 214 F.3d 245, 251 (2d Cir.2000) (internal quotations and citations omitted). Plaintiff-grantees' submission of their Clarified Proposal confers standing to challenge its rejection. *See, e.g., id.* (submission of application for license to the FCC would have been sufficient to confer standing); *Bach v. Pataki,* 289 F.Supp.2d 217, 223 (N.D.N.Y.2003) (discussing how application for a permit confers standing to challenge permit scheme). In addition to suffering this "injury-in-fact," they clearly meet the other constitutional standing requirements, and prudential standing is not implicated. *See Foti v. City of Menlo Park,* 146 F.3d 629, 635 (9th Cir.1998) ("An as-applied challenge does not implicate the enforcement of the law against third parties.").

The as-applied challenges are also ripe for judicial determination. *See Marchi v. Board of Coop. Educ. Servs.,* 173 F.3d 469, 478 (2d Cir.1999) ("For a case to be deemed justiciable under Article III, it must be ripe. Indeed, ripeness is a constitutional prerequisite to exercise of jurisdiction by federal courts." (internal quotations and citations omitted)); *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *overruled on other grounds, Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977) (ripeness requirement is intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements"). The Clarified Proposal is hardly abstract; therefore, LSC's rejection of the proposal renders the as-applied challenges "fit for judicial consideration"; moreover, "withholding of

consideration will cause substantial hardship to the parties." *United States v. Balon,* 384 F.3d 38, 46 (2d Cir.2004) (internal citations and quotations omitted). Furthermore, "in the First Amendment context, the ripeness doctrine is somewhat relaxed[,]" *Dougherty v. Town of North Hempstead Bd. of Zoning Appeals,* 282 F.3d 83, 90 (2d Cir.2002), because of the "fear of irretrievable loss." *Id.* (quoting 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3532.3 (1984).

2. The Undue Burden Test

Although the Second Circuit in *Velazquez II* opened the door to the present as-applied challenges by affording grantees of LSC funds the opportunity to demonstrate that the program integrity rules "in fact unduly burden [their] capacity to engage in protected First Amendment activity[,]" 164 F.3d at 767, it did not explain how the undue burden test should be applied in order to determine whether government-imposed restrictions on the creation of alternative channels unreasonably burden a grantee's ability to use non-federal funds to engage in restricted activities. It is now necessary to do so. There is, however, no caselaw addressing this precise issue.

At oral argument, plaintiff-grantees proposed a "weighted balancing test[,]" June 16, 2004 Tr. at 11,[18]

18. In prior written submissions to the Court, plaintiff-grantees took the position that the Court must engage in something closer to strict scrutiny, relying on Supreme Court cases in which content-based restrictions on speech were being evaluated, *see* Pls.' Mem. (Cont'd)

requiring the Court to weigh the nature of the First Amendment rights burdened against the interests of the Government in creating the burdens. They argue that the balance tips in their favor because the Government "has imposed a significant burden" upon their First Amendment rights "without a real justification. . . ." *Id.* at 24.

LSC and the Government eschew a weighted balancing test. LSC urges a two-pronged inquiry: (1) "does the regulation fit the governmental interest [,]" and (2) "will the regulation make it effectively impossible for the grantee to actually exercise its constitutional rights through the alternative channel[.]" *Id.* at 23. The Government essentially agrees, stating that "so long as there is a fit between the government's purposes and the means by which the regulations at issue achieve that purpose, that is satisfactory[,]" *id.* at 19, noting that in determining the "fit," the Court can "take into account plaintiff[s'] alleged harm." *Id.* They collectively contend that the Supreme Court's decisions in *TWR, League of Women Voters* and *Rust* support their positions. *See, e.g.,* Mem. Intervenor-Def. Opp. Pls.' Mo. Prelim. Inj. at 20-21.

Notably, the Second Circuit's adoption of the undue burden standard was *dicta* since all that was before the court were facial challenges. The *dicta* evolved after the circuit

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at 21-24, 25, 38-39; such restrictions are not at issue here. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (noting that "content-based burdens must satisfy the same rigorous scrutiny as . . . content-based bans" on speech).

court rejected plaintiffs' contention in support of their facial challenge to the program integrity rules that the "requirements of separate offices, equipment, libraries and personnel that grantees must meet in order to be able to speak through affiliates" imposed "extraordinary burdens that impermissibly impede grantees from exercising their First Amendment rights to associate with clients, to lobby, and to litigate." *Velazquez II,* 164 F.3d at 767 (internal citations and quotations omitted). As the Court previously noted, the circuit court rejected this facial challenge because "[p]laintiffs have ... failed to establish that no set of circumstances exists under which the Act would be valid" since "[i]t appears likely that LSC grantees with substantial non-federal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty." *Id.* (internal citation omitted).[19]

The circuit court did not cite to any authority for this *dicta*. However, in *TWR,* the Supreme Court, although holding that "[i]t is not irrational for Congress to decide that tax exempt charities such as TWR should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying[,]" 461 U.S. at 550, 103 S.Ct. 1997, noted "that TWR can obtain tax deductible contributions for its non-lobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for non-

19. Of course, the issue in respect to plaintiff-grantees' as-applied challenges is not whether there may be "substantial non-federal funding" available at any point in time to "provide the full range of restricted activity," but whether the program integrity rules unduly burden plaintiff-grantees' right to create alternative channels with non-federal funds.

lobbying activities and a § 501(c)(4) organization for lobbying." *Id.* at 544, 103 S.Ct. 1997. Although "TWR did not bring this suit because it was unable to operate with the dual structure[,]" *id.* at 544 n. 6, 103 S.Ct. 1997, the Court, in an effort to assuage the concern of some *amici* "that the IRS may impose stringent requirements that are unrelated to the congressional purpose of ensuring that no tax-deductible contributions are used to pay for substantial lobbying, and effectively make it impossible for a § 501(c)(3) organization to establish a § 501(c)(4) lobbying affiliate[,]" *id.*, commented:

> No such requirement in the code of regulations has been called to our attention. Nor have we been able to discover one. The IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying. *This is not unduly burdensome.*"

Id. (emphasis added).

Notably, in a concurring opinion, joined by Justices Brennan and Marshall, Justice Blackmun cautioned that "as long as the IRS goes no further" than to require separate incorporation and record keeping from its § 501(c)(4) affiliate, there would be no constitutional infringement, but that "[a]ny significant restriction on this channel of communication ... would negate the saving effect of § 501(c)(4)[,][2] raising "insurmountable" First Amendment problems. *Id.* at 553, 103 S.Ct. 199.

Consequently, the Court reads *TWR* as providing a foundation for the circuit court's *dicta* in *Velazquez II* embracing the undue burden standard for determining whether the Government has provided adequate alternative channels where it has imposed restrictions on First Amendment expressions as conditions for accepting federal subsidies. Since this *dicta* was obviously designed to guide the district court in the event of an as-applied challenge to the program integrity rules, the Court considers it "judicial dictum," rather than "obiter dictum," *see Bell,* 524 F.2d at 206, which it will follow.

In embracing the undue burden standard, the circuit court eschewed the taxonomic polarities of rational review and strict scrutiny, and chose an intermediate form of review, requiring the Court to engage in balancing the burdens imposed upon the plaintiff-grantees by LSC in the application of the program integrity rules, with its interests in doing so.[20]

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20. As one eminently regarded constitutional law scholar commented in a provocative article assessing the difference between judicial decisionmaking under the "twin masts" of strict scrutiny and rational review, and the "siren song of the sliding scale" inherent in balancing:

> Categorization and balancing each employ quite different rhetoric. Categorization is the taxonomist's style-a job of classification and labeling. When categorical formulas operate, all the important work in litigation is done at the outset. Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing of the claimed right against the government's

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In a useful article, written in 1993, the author, Curtis E. Harris, identified the range of cases throughout the prior five decades where the Supreme Court applied the undue burden standard, and the evolving nature of judicial review under that level of scrutiny. *See* Curtis E. Harris, *An Undue Burden Balancing in the Age of Relativism,* 18 Okla. City U.L.Rev. 363 (1993). He calculated that from 1945 to the date of his article, the Supreme Court had used that term or something synonymous in 256 decisions, covering a far-reaching spectrum of constitutional law. *See id.* at 407-09, 423. However, as he discerned, the concept was most frequently deployed in Commerce Clause and abortion cases. *See id.* at 424. Since this article, it has found a home in ballot access cases. Collectively, they serve as guidance to the Court and point to the direction it should travel in the uncharted waters it faces in the present case.[21]

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> justification for the infringement. Balancing is more like grocer's work (or Justice's)-the judge's job is to place competing rights and interests on a scale and weigh them against each other. Here the outcome is not determined at the outset, but depends on the relative strength of a multitude of factors.

Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing,* 63 U. Colo. L.Rev. 293, 293-94, 296 (1992).

21. The adoption of the undue burden test by the circuit court in *Velazquez II* for evaluating the adequacy of alternative channels for First Amendment speech in cases where Congress has placed restrictive conditions on subsidies appears to be the first time that it

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Abortion Cases: In the abortion context, an undue burden on a woman's right to choose an abortion is one that presents a "substantial" obstacle to that choice. *See Stenberg v. Carhart,* 530 U.S. 914, 921, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000). In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court abandoned the trimester framework established in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and adopted the undue burden test to evaluate the regulation of abortions post-viability "in an effort to balance fairly the interests between potential life and a woman's privacy." Elizabeth A. Schneider, *Workability of the Undue Burden Test,* 66 Temp. L.Rev. 1003, 1003 (1993).

The Court noted that *Roe's* trimester framework had undervalued the state's "important and legitimate interest in protecting the potentiality of human life," *Casey,* 505 U.S. at 871, 112 S.Ct. 2791 (quotations and citation omitted); thus, the undue burden test was meant to accommodate that interest. Accordingly, the Court held that an undue burden exists when a "statute which, while furthering the interest in

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has been articulated in a pure First Amendment speech setting. Nonetheless, the concept of balancing "has had a long affair with the First Amendment." T. Alexander Alenikoff, *Constitutional Law in the Age of Balancing,* 96 Yale L.J. 943, 967 (1987). It has invariably been utilized for "time, place, and manner review of content-neutral regulations in public forums" and "content-neutral laws that incidentally sweep in protected speech," requiring the government to show an "important or substantial interest." Sullivan, *supra,* at 297 (internal citation omitted).

potential life or some other valid state interest, has the effect [or purpose] of placing a substantial obstacle in the path of a woman's choice" and therefore "cannot be considered a permissible means of serving [the state's] legitimate ends." *Id.* at 877, 112 S.Ct. 2791; *see* Susan Frelich Appleton, *Standards for Constitutional Review of Privacy-Invading Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue Burden Test,* 49 Vand. L.Rev. 1, 62 (1996) ("The undue-burden test formulated in *Casey* directs courts to consider the purpose and effect of a legal rule or governmental decision.").

Commerce Clause Cases: The commerce clause "prohibits state taxation, or regulation, that discriminates against or *unduly burdens* interstate commerce. . . ." *General Motors Corp. v. Tracy,* 519 U.S. 278, 287, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997). The seminal case applying the undue burden test under the commerce clause is *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), where the Supreme Court stated:

> Where [a] statute regulates [commerce] even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved,

> and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike, 397 U.S. at 142, 90 S.Ct. 844 (internal citations omitted).

Ballot Access Cases: The origin of the undue burden test in ballot access cases stems from the Supreme Court's articulation in *Lubin v. Panish,* 415 U.S. 709, 716, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974), that "the right to vote is heavily burdened if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot." More recently, Chief Judge Korman, in employing the test in striking down restrictive signature requirements, explained:

> Analysis of the validity of ballot access signature requirements to determine whether they unduly burden the right to vote proceeds in three steps:
>
> [A reviewing court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all of these factors is

> the reviewing court in a position to decide whether the challenged provision is unconstitutional. *Anderson v. Celebrezze,* 460 U.S. 780, 789[, 103 S.Ct. 1564, 75 L.Ed.2d 547] . . . (1983) (internal citation omitted).

Rockefeller v. Powers, 917 F.Supp. 155, 159-60 (1996).

What can fairly be gleaned from the articulation of the undue burden standard in the abortion, Commerce Clause and ballot access cases is that there is an obvious qualitative facet to its implementation: the greater the right, the greater the justification needed to compromise the right. The Court should, therefore, examine the nature of the right impacted and the nature and significance of the Government's interests in burdening that right-requiring the Court to determine the legitimacy and strength of each of those interests and "the extent to which those interests make it necessary to burden the plaintiff[s]' rights," *Powers,* 917 F.Supp. at 160 and then weigh one against the other to determine whether the balance has been properly struck by the plaintiff-grantees' Clarified Proposal. *See* Harris, *supra,* at 363 (Judicial balancing "requires the explicit articulation and comparison of rights or structural provisions, modes of infringement, and government interests.").

This is a far-cry from the defendants' restrictive view of the undue burden test-that the program integrity rules should simply "fit" the Government's interest and, in LSC's view, "make it effectively impossible for the grantee to actually exercise its constitutional rights through the alternative channel [.]" June 16, 2004 Tr. at 23. This is the antithesis of

balancing burdens against interests which all courts have embraced whenever called upon to apply an undue burden standard in the face of a constitutional challenge. There is simply no case support for defendants' preclusive position, which would in effect render balancing nugatory, and their reliance on *Rust, TWR and League of Women Voters* is clearly misguided.

Initially, each of those cases only entailed facial challenges, invoking the restrictive constitutional principles applicable to such challenges. Moreover, as has been seen, *Rust* has little bearing here because it involved the use by the government of "private speakers to transmit specific information pertaining to its own programs." *Velazquez III*, 531 U.S. at 541, 121 S.Ct. 1043. *TWR* also offers no cover for defendants. Notably, LSC believes *TWR* supports LSC's "impossibility" criteria because it construes the Supreme Court's language in footnote 6 as holding that the lobbying restrictions would not be unduly burdensome "so long as they did not make it 'effectively impossible' for the tax-exempt entities to establish the affiliates." Letter from Stephen L. Ascher on behalf of LSC (July 15, 2004) at 5. This is an incorrect reading of the footnote. The Supreme Court never rendered such a holding. As previously noted, it was only responding to the concern of "TWR and some *amici* . . . that the IRS may impose stringent requirements" that would make it "effectively impossible for a § 501(c)(3) organization to establish a § 501(c)(4) lobbying affiliate." *TWR*, 461 U.S. at 544 n. 6, 103 S.Ct. 1997. Rather than embrace an "impossibility" standard, the Court, in this footnote, simply noted that it was not unduly burdensome for the IRS to require separate incorporations and record

keeping; moreover, as also previously noted, the concurring opinion cautioned that if significant additional constraints were to be imposed, it would raise "insurmountable" First Amendment problems. *TWR*, 461 U.S. at 553, 103 S.Ct. 1997.

Finally, defendants can hardly draw comfort from *League of Women Voters*, where, in striking down a ban on noncommercial editorializing, the Supreme Court, although rejecting the most exacting degree of First Amendment protection, nonetheless viewed the *nature* of the speech entailed in media broadcasting as "indispensable to the discovery and spread of political truth [,]" 468 U.S. at 383, 104 S.Ct. 3106 (citation omitted), requiring the Court to be "especially careful in weighing the interests that are asserted in support of this restriction and in assessing the precision with which the ban is crafted." *Id.* Rather than support defendants' circumscribed view of the undue burden standard, *League of Women Voters* further counsels the Court to carefully consider the nature of plaintiff-grantees' interests, and cautions the Court to use special care in weighing those interests against the Government's justifications for intruding upon them if they strike at the core of rights protected by the First Amendment.

3. The Nature of the Right.

Although (other than the "suits-for-benefits" exception) none of the plaintiff-grantees' rights have been trampled upon in the context of their facial challenges because the Government's restrictions are viewpoint neutral, their entitlement to create alternative channels with non-federal funds for the exercise of their First Amendment rights free

from uncalled-for government constraints places these rights in a different posture. Indeed, the circuit court in *Velazquez II* expressly recognized that in an as-applied challenge, "the program integrity requirements may prove especially burdensome in the context of *legal services.*" *Velazquez II,* 164 F.3d at 767. The nature of lawyering is, therefore, very much at issue.

Although the courts have yet to decide "whether the traditional lawyer-client relationship enjoys constitutional protection," *Velazquez II,* 164 F.3d at 765, the Supreme Court in *Velazquez III,* in recognizing that "the LSC program was designed to facilitate private speech," 531 U.S. at 542, 121 S.Ct. 1043, implicitly acknowledged the obvious-that the First Amendment is bound up in the speech and associations inherent in lawyering. Indeed, as the Court noted in *Velazquez I,* "when the Government imposes upon the time-honored functions of the lawyer ... it treads deeply in waters bound up in First Amendment sensibilities." *Velazquez I,* 985 F.Supp. at 342. A good compendium of the breadth of constitutional concerns impacting lawyering, as pointed out in the Court's prior decision, *see id.,* is contained in *LASH I,* encompassing under the First Amendment umbrellas of freedom of speech, freedom of association and the right to petition for the redress of grievances, "meaningful access to the courts"; "protection from government's intentional interference with the confidential relationship between lawyers (or legal aid associations) and prospective clients"; and "the right to lobby legislators and administrators." 961 F.Supp. at 1408-09. And, as *LASH I* points out, although "[n]o appellate court has previously extended First Amendment

protection to class actions despite encouragement from scholars [,]" the time may soon come when that will happen. *Id.* at 1410 (citations omitted).

Notably, as for meaningful access to the courts, it is uncertain whether the First Amendment is the exclusive basis for this right. *See Monsky v. Moraghan,* 127 F.3d 243, 246 (2d Cir.1997) ("[T]he source of this right has been variously located in the First Amendment right to petition for redress, the Privileges and Immunities Clause of Article IV, section 2, and the Due Process Clauses of the Fifth and Fourteenth Amendments."). Nonetheless, it enjoys a heightened status in the lexicon of constitutional jurisprudence since it encompasses the right to petition for the redress of grievances, which is "among the most precious of liberties safeguarded by the Bill of Rights[,]" *United Mine Workers of Am. v. Illinois Bar Ass'n,* 389 U.S. 217, 222, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); moreover "its historical reach is such that it has poignantly been argued that it is even more firmly rooted than the freedoms of speech and press." *Brown v. Stone,* 66 F.Supp.2d 412, 433 (E.D.N.Y.1999) (citing Kara E. Shea, Note, *San Filippo v. Bongiovanni: The Public Concern Criteria and Scope of the Modern Petition Right,* 48 Vand. L.Rev. 1697, 1700 (1995) ("There is no doubt that the recognition of the petition right in Anglo-American jurisprudence substantially predates the recognition of the other enumerated first amendment rights.")). *See also Roberts v. United States Jaycees,* 468 U.S. 609, 637, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (O'Connor, J., concurring) ("[S]ome lawyering activity is undoubtedly protected by the First Amendment. '[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within

the protection of the First Amendment.' " (quoting *In re Primus,* 436 U.S. at 426, 98 S.Ct. 1893).

With this heightened view of the nature of speech and the other constitutional precepts at the heart of lawyering, the Court now turns to the application of the undue burden standard in the present case.

4. The Burdens

Plaintiff-grantees argue, collectively, that precluding affiliates from sharing equipment, personnel and physical space (meaning same physical location but separate rooms or same rooms but at separate times) unduly imposes (1) financial, (2) programmatic, and (3) administrative burdens.

In regard to the financial burdens, they point out the obvious-that to require the duplication of programs, office space, equipment, personnel, and administrative structures, would be substantial. As for the programmatic burdens, they contend that LSC's restrictions would result in dramatically less effective provision of legal services, citing, as an example, that "lawyers in LSC-restricted programs that receive some LSC funding are less able to effectively represent their clients if they are segregated from the lawyers who are handling class wide claims" because "[t]he capacity to spot issues in need of litigation, to learn about class wide claims and class wide relief, and to integrate clients claims into larger suits or lobbying efforts confronting systemic problems, is effectively impaired when advocates are impeded in their efforts to associate with lawyers bringing class actions or lobbying." Pls.' Notice Mo. Consol. & Prelim.

Inj. ("Pls.' Notice"), Ex. J, Declaration of Andrew Scherer ¶ 17.

The administrative burdens, in plaintiff-grantees' view, flow from the need to "allocat[e] personnel and resources between the separate programs"; "decid[e] which cases are to be allocated to which program"; and "regulat[e] contact between and among the lawyers employed by the separate programs." Pls.' Mem. at 29. Thus, operating an affiliate in a separate physical location and with separate staff would hamper "effective communication and coordination among the staff" because "casehandlers in the two programs would have to figure out how to discuss different matters being handled for the same client. Project directors would have to answer constant practical questions about allocation of staff [and][s]eparate boards would have to make decisions concerning ... resources and fundraising efforts." Pls.' Notice, Ex. E, Declaration of John C. Gray ¶ 12.

LSC declined an offer by the Court for a hearing to factually challenge plaintiff-grantees' propounded administrative and programmatic burdens, *see* Order dated Nov. 8, 2004 at 6 (inquiring "whether a factual hearing need be held ... regarding these alleged burdens"), adhering to its previously declared position that they were "based purely on speculation" because "none of the program plaintiffs has actually created an affiliate." Letter from Stephen L. Asher on behalf of LSC (July 15, 2004) at 7 n. 4. *See* Nov. 15, 2004 Tr. at 19 ("LSC's position is that since none of the grantee plaintiffs have actually tried to do this, that the burdens they are referencing here are purely speculative, and we really don't have a concrete sense of how burdensome

they can be."). In light of its rejection of the Clarified Proposal, LSC's argument is obviously circular.

On an individual basis, plaintiff-grantees have established, pursuant to the parties' stipulation, the following relevant undisputed facts, which give specific content to these general burdens:

a. LSNY

LSNY is an umbrella LSC entity servicing indigent civil clients throughout New York City, and allocates its annual federal grants to various associated legal services units, such as Queens Legal Services ("QLSC") and plaintiff-grantee SBLS. Representative of its dependency on LSC and non-LSC funds, out of its total budget in 2001 of approximately $32,000,000, the sum of $12,000,000 (38%) came from LSC. *See* Stipulation ¶¶ 19, 20. In 2001, QLSC estimated that it would cost at least $200,000 per year if it were to create an affiliate to operate in a separate location and not share equipment or staff. *See id.* ¶ 25. Neither QLSC nor any other LSNY unit has created an affiliate to provide unrestricted legal services with non-LSC funds. *See id.* ¶ 29.

b. SBLS

SBLS services indigent civil clients in Brooklyn and, as noted, receives LSC funds from LSNY. It had a budget in 2000 of $4,301,372, of which 33% came from LSC, and the remaining 67% from private and non-LSC government donors. *See id.* ¶ 36. As of June 2004, it had 34 lawyers, and currently has one intake mechanism and one board of

directors. *See id.* ¶¶ 37-39. "At some point in time prior to June 2002," it determined that "an affiliate which operated in a physically separate locality, did not share any equipment and shared only one attorney, would cost the organization at least $380,000, which is 8% of the budget." *Id.* ¶ 41. Specifically, these expenses "would cover additional staff, equipment and rent," resulting in the unrestricted affiliate serving approximately 500 fewer clients than SBLS then served; moreover, "SBLS and the unrestricted affiliate would have fewer staff available to serve clients than SBLS now has." *Id.* Accordingly, SBLS has not created an affiliate. *See id.* ¶ 42.

c. FWLS

FWLS serves clients throughout New York State's rural areas, representing migrant and seasonal farm workers and many non-citizen clients. *See id.* ¶¶ 53, 55. Its work involves reaching out to workers in isolated rural labor camps; accordingly, its attorneys frequently travel long distances since its clients often do not have access to telephones or to public transportation. *See id.* ¶¶ 57-60. In 1996, at the time the restrictions were imposed, its annual budget, with federal funding, was $582,000. *See id.* ¶ 73. It thereafter declined further federal funding of $106,000 for the second half of 1996, rather than be subject to the restrictions; this resulted in the reduction of two attorney positions and all four of its support staff positions. *See id.* ¶¶ 72, 74. It currently operates one office with eight employees. *See id.* ¶ 75. If it were to once again receive federal funding, it would open two additional offices in order to better serve its statewide clientele. *See id.*

Appendix C

After the restrictions were enacted, FWLS considered whether it could feasibly create an affiliate, but calculated that "if it created a dual office structure, with separate executive directors, separate staff, separate furniture, separate equipment, separate computers, and other separate administrative requirements, it would cost the organization at least $130,000 in the first year and $80,000 annually thereafter." *Id.* ¶ 63. In 1997, it considered creating an affiliate "to operate exclusively with non-LSC funds, and to share all staff, all equipment and all physical premises with FWLS"; it would keep separate financial records, time records, and activity reports to ensure that LSC funds would not be spent on restricted activities. *Id.* ¶ 66. Its executive director was informally told by LSC that this would probably not satisfy the program integrity rules; consequently, it never submitted an affiliation proposal and chose to continue to function without LSC funding. *See id.*

LSC and the Government take a dim view of these financial burdens, contending that they are not imposed by the Government but are simply representative of the inherent costs in the establishment of any affiliate, and should not suffice to countermand the overarching rationale behind the program integrity rules of ensuring that LSC funds are devoted to providing basic civil legal services to indigents, rather than the more expansive services reflected by the restricted activities.

5. The Government's Asserted Interests

LSC has articulated two governmental interests that it contends are served by the program integrity rules'

requirement of physical and financial separation: "prevent[ing] federal funds from indirectly subsidizing activities that Congress did not want to subsidize directly, and also ... prevent[ing] the appearance that the federal government was funding the restricted activities." LSC's Mem. Opp. Pls.' Mot. Prelim. Inj. ("LSC's Mem.") at 4 (emphasis omitted). These interests reflect Congress' rationale for restricting the use of non-federal funds by recipients of LSC grants:

> There are two important justifications for this restriction. First, many legal services grantees currently receive funds from both public and private sources[.] Since the money is basically fungible, it would be difficult if not impossible to place restrictions only on the Federal funds. Second, the public cannot differentiate between LSC advocacy subsidized with public versus private funds. As a result, the public grows weary of watching LSC attorneys lobby legislators-even if that dismay might sometimes be misplaced.

S.Rep. No. 104-392 (1996) at *7. *See also* H.R.Rep. No. 104-196 at *121 ("The Committee recommendation significantly strengthens current restrictions and expands them to encompass all funding received by a grantee.... The Committee believes that it is inappropriate for Federal resources to be used to support directly or indirectly these [prohibited] activities."). The Court considers each of these justifications, in turn.

Appendix C

a. Preventing the Appearance of Endorsement of Restricted Activities

Initially, defendants rely on *Rust* and *National Endowment of the Arts v. Finley,* 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998), to support the significance of the Government's interest in preventing the appearance that it is endorsing prohibited activities. Such reliance is misplaced. As previously noted, *Velazquez III* teaches that the LSC program is distinguishable from the Title X program at issue in *Rust* in "the vital respect" that "the LSC program was designed to facilitate private speech," whereas the Title X program used private speakers "to promote a governmental message." 531 U.S. at 541-42, 121 S.Ct. 1043 (explaining that LSC-funded attorney speaks not on the behalf of the government but "on the behalf of his or her private, indigent client."). Because under the LSC program "there is no programmatic message of the kind recognized in *Rust* [,]" *id.* at 548, 121 S.Ct. 1043, the Government's interest in preventing the appearance of endorsement is much less weighty here than it was in *Rust*.

Finley is also inapposite. In addressing the question of whether the Government could make aesthetic judgments about decency in awarding funding for the arts, the Supreme Court made passing reference to Congress' authority to selectively fund one activity to the exclusion of another, *see Finley,* 524 U.S. at 588, 118 S.Ct. 2168; however, the Government's interest in preventing the appearance of endorsement was not at issue in that case.

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The Government's interest in preventing the appearance of endorsement has been addressed primarily in the context of the First Amendment's Establishment Clause. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). The Supreme Court has explained that the Government's desire to comply with the Establishment Clause is a sufficiently compelling interest, in some circumstances, to justify content-based restrictions on speech. *See id.* at 761-62, 115 S.Ct. 2440. Nonetheless, despite the compelling nature of this interest, the Supreme Court has noted that disclaimers may suffice. For example, in *Pinette* the Supreme Court considered whether Ohio violated the First Amendment by prohibiting the display of a cross on state capitol grounds. The state relied on its "interest in avoiding official endorsement of Christianity, as required by the Establishment Clause[,]" to justify the prohibition. *Id.* at 761, 115 S.Ct. 2440. A plurality of the Court explained that "[i]t has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may-even reasonably-confuse an incidental benefit to religion with state endorsement. If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the *Square to be identified as such." Pinette,* 515 U.S. at 768-69, 115 S.Ct. 2440. *See also Board of Educ. v. Mergens,* 496 U.S. 226, 270, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (Marshall, J., concurring) (explaining that school district could avoid appearing to sponsor or endorse a Christian club's goals by "affirmatively disclaim[ing] any endorsement" of the club); *Hsu v. Roslyn Union Free Sch. Dist. No. 3,* 85 F.3d 839, 864-65 (2d Cir.1996) (explaining that when the Roslyn school board recognized a Christian

club, it "drew a *cordon sanitaire* between the School and the Club" by directing the superintendent "to cause all listings, communications and announcements issued by the District pertaining to said Club expressly to state that the Roslyn School District does not endorse the Club, but is mandated by the Federal Equal Access Act to permit the Club's activities. These terms meet the requirement of Justice Marshall's concurrence in *Mergens* "; accordingly, "the School's stated purpose could not be mistaken for an endorsement." (internal quotations omitted)).

In a related context, for federal "charitable choice" programs, which fund religious organizations to perform secular social services activities, Congress has required only minimal bookkeeping separation to satisfy its concern with preventing the appearance of endorsement of religion. *See, e.g.*, Personal Responsibility and Work Opportunities Reform Act of 1996, Pub.L. 104-193, 42 U.S.C. § 604a(j); Human Services Reauthorization Act of 1998, Pub.L. 105-285, 42 U.S.C. § 9920(c),(d); Children's Health Act of 2000, Pub.L. 106-310, 42 U.S.C. § 300x-65.

From the foregoing, the Court gleans that even in the context of the Establishment Clause, where government entities have a significant interest in avoiding the appearance that they have violated the Constitution by endorsing religion, disclaimers and bookkeeping have been deemed sufficient to satisfy that interest.[22] In the context of legal services

22. Disclaimers have also been held sufficient to prevent public confusion over private endorsement of speech. Notably, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d

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programs, however, there is no similar constitutional mandate prohibiting endorsement. Instead, Congress' interest in preventing the appearance of endorsement was simply grounded in its perception that the public was "grow[ing] weary of watching" LSC-funded attorneys engage in restricted activities. S.Rep. No. 104-392 at *7.

The Court cannot conclude, however, as plaintiff-grantees urge, that the Government has *no* legitimate interest in preventing clients, litigants, the courts and the public at large from becoming confused about whether Congress is funding restricted activities. Such an interest goes hand-in-hand with Congress' broad power to define the limits of programs supported by public funds. *See, e.g., League of Women Voters,* 468 U.S. at 395, 104 S.Ct. 3106 ("[T]he Government certainly has a substantial interest in ensuring that the audiences of noncommercial stations will not be led to think that the broadcaster's editorials reflect the official view of the government. . . ."). Nonetheless, the Government has not explained why its interest in preventing the public

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741 (1980), the Supreme Court held that a California law permitting individuals to exercise their free speech rights at privately owned shopping centers did not violate the shopping center owner's First Amendment rights. The owner argued that he had a right "not to be forced by the State to use his property as a forum for the speech of others." *Id.* at 85, 100 S.Ct. 2035. Rejecting this argument, the Supreme Court noted that "appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." *Id.* at 87, 100 S.Ct. 2035.

appearance of endorsement is so weighty, given that the LSC program was designed to facilitate private speech, that it cannot be accommodated by employing simple prophylactic measures. *See id.* (explaining that the Government's interest in preventing public confusion "can be fully satisfied by ... simply requir[ing] public broadcasting stations to broadcast a disclaimer every time they editorialize which would state that the editorial represents only the view of the station's management and does not in any way represent the views of the Federal Government or any of the station's other sources of funding.").

b. Preventing Indirect Subsidization of Restricted Activities

LSC contends that this asserted interest has two components: (1) ensuring that as a result of LSC's support, non-federal funds are not "freed up" to support restricted activities; (2) discouraging affiliates from taking advantage of economies of scale by sharing facilities with grantees. *See* June 16, 2004 Tr. at 13 ("LSC funds would free up the non-LSC funds for the grantee to do more [restricted activities]"); Letter from Stephen L. Ascher on behalf of LSC (Jul. 15, 2004) at 7 ("Because money is fungible, there is a danger that a subsidy could have the effect of promoting ... restricted activities by making more funds available to the grantee as a whole and allowing the grantee to take advantage of certain economies of scale."). Plaintiff-grantees respond that "[t]he government has no valid interest in erecting an economic spite fence that is designed to discourage disfavored First Amendment activity by raising its cost. . . ." Pls.' Reply Mem. at 30.

With respect to the first component, the Court rejects the notion that simply because the Government would prefer that plaintiff-grantees use their non-federal funds for activities favored by the Government, the Government has a legitimate interest in discouraging them from using non-federal funds to engage in constitutionally protected First Amendment activities by placing significant burdens on their ability to establish affiliates to engage in such activities. *See Cullen v. Fliegner,* 18 F.3d 96, 104 (2d Cir.1994) ("a state cannot have a legitimate interest in discouraging the exercise of constitutional rights").

With respect to the second component, which relates to the separate facilities factor of the program integrity rules, the Court again finds *League of Women Voters* instructive. In rejecting the FCC's argument that a ban on editorializing by noncommercial educational broadcasting stations that accepted federal funds was necessary to prevent the subsidization of editorializing, the Supreme Court explained that the ban would be constitutional if it "permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations which could then *use the station's facilities* to editorialize with nonfederal funds. . . ." 468 U.S. at 400, 104 S.Ct. 3106 (emphasis added). The Court recognizes that the cost and difficulty for a broadcasting station to set up separate broadcasting facilities for editorializing is likely greater than for a legal services organization to establish separate facilities for an affiliate; nonetheless, it is worth noting that the Supreme Court in *League of Women Voters* did not share the Government's concern that the risk of subsidization necessarily required separate facilities.

Moreover, the Government has a countervailing interest in ensuring that indigent legal-services clients receive efficient and effective representation. *See* 42 U.S.C. § 2996f(a)(3) (requiring LSC to "insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance. . . ."); 45 C.F.R. § 1634.9(a)(2) (enumerating LSC's selection criteria for grant applicants, including the "feasibility and cost-effectiveness of the applicant's legal services delivery and delivery approach"). By requiring grantees to establish separate facilities for their affiliates in order to engage in protected First Amendment activities, the program integrity rules negatively impact the grantees' efficiency and effectiveness.

For all these reasons, the Court concludes that the Government's interest in preventing the indirect subsidization of restricted activities is not so weighty as to support the imposition of significant restrictions on the sharing by a plaintiff-grantee of its facilities with an affiliate. Nonetheless, it cannot be said that LSC has no legitimate interest in ensuring that federal funds will not be used to support restricted activities. LSC has not explained, however, why this interest cannot be accommodated by simple timekeeping and accounting methods. *See* S.Rep. No. 104-392 (Additional Views of Senators Kennedy, Pell, Dodd, Simon, Harkin, Mikulski and Wellstone) at *21 ("Any concern about fungibility of funds can be addressed by strict timekeeping requirements. In fact, the new timekeeping requirements will ensure that LSC funds are not used inappropriately to supplement or provide overhead for restricted activities that

Congress has determined are inconsistent with the purposes of the LSC Act.").[23]

6. The Balancing

Although an agency's reasonable interpretation and application of its rules are ordinarily entitled to deference, no deference attaches where, as in the present case, "they raise serious constitutional questions." *Miller v. Johnson,* 515 U.S. 900, 923, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *see also* Administrative Procedure Act, 5 U.S.C. § 706(2) (requiring a court to "hold unlawful and set aside agency action, finding and conclusions found to be (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law" or "(B) contrary to constitutional right, power, privilege, or immunity"); *Esden v. Bank of Boston,* 229 F.3d 154, 168 (2d Cir.2000) ("an agency's reasonable, consistently held interpretation of its own regulation is entitled to deference" provided it "does not violate the Constitution").

Indeed, the very purpose for the adoption of the program integrity rules was to provide a vehicle for the unrestricted use of non-federal funding of legal services for the poor in order the save the Act's constitutionality. The history of the

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23. Section 504(a)(10) of the Act requires the recipient to "maintain records of time spent on each case or matter with respect to which the person or entity is engaged," and to ensure that funds "received from a source other than [LSC] . . . and disbursements of such funds, are accounted for and reported as receipts and disbursements, respectively, separate and distinct from [LSC] funds[.]"

evolution of the final program integrity rules, as recounted by the Court in *Velazquez I,* reflects that they escaped constitutional interdiction because, unlike the interim rules, they provided that "LSC-funded legal aid societies will be able to control affiliates who care for the poor in areas from which the regulations restrict the societies," *Velazquez I,* 985 F.Supp. at 336 (quoting *Legal Aid Society of Hawaii v. Legal Services Corp.*, 981 F.Supp. 1288 (D.Haw.1997) ("*LASH II*")), and eliminated the *per se* requirement for insular separate facilities. *See id.* at 335. *See also LASH II,* 981 F.Supp. at 1289 ("With this ability to control the separately incorporated and insular second organization, the Court finds that alternative channels exist for LSC-funded organizations to exercise their constitutionally protected rights such as lobbying the legislature."). While the unconstitutional-conditions doctrine "does not require regulations to eliminate all practical difficulties in pursuing the alternative channel in order to pass constitutional muster," *id.* at 1295, this history elucidates the care that has been taken by the courts to ensure that the rules adopted by LSC will give birth to viable alternative channels, and not place unjustifiable obstacles in the path of their creation.

LSC's application of the various factors comprising physical and financial separation so that a recipient will have "objective integrity and independence from any organization that engages in restricted activities," 45 C.F.R. § 1610.8(a), must therefore be viewed with this constitutional history in mind, and with a careful eye as to whether LSC hewed to its two legitimate justifications in rejecting the plaintiff-grantees' Clarified Proposal-preventing the appearance of

endorsement and the indirect subsidization of restricted activities.

Given the nature and constitutional dimension of plaintiff-grantees' right to establish affiliates with non-federal funds in order to provide the full range of First Amendment activities inherent in the rendering of legal services, and the nature of LSC's justifications, such as they are, for the promulgation and application of its program integrity rules, plaintiff-grantees' detailed Clarified Proposal strikes the proper balance to ensure that LSC's legitimate interests will be accommodated without unduly burdening this right, except in respect to certain aspects of the four parts of the Clarified Proposal which have divided the parties in regard to the sharing of equipment, physical premises, employee time and intake. Their differences, however, are not profound. Indeed, LSC has acknowledged that the Clarified Proposal's "signage and disclaimers would appear to indicate physical and financial separation," and has recognized that a grantee and its affiliate could "share all physical premises, equipment and staff" if they had "extensive signage and other indicia of separateness to address the obvious perception that the respective organizations are not, in any but a superficial way, physically and financially separate." *See* OLA External Opinion at 6. The following qualifications in respect to these four aspects of the Clarified Proposal will, in the Court's view, accommodate the requisite balancing of the parties' competing interests.[24]

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24. The Court has a "wide range of discretion in framing an injunction in terms it deems reasonable to prevent wrongful conduct," *Forschner Group, Inc. v. Arrow Trading Co.*, 124 F.3d 402, 406 (2d

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Appendix C

a. Equipment

LSC has not articulated how the sharing of equipment would implicate its interest in avoiding the appearance of endorsement. As for indirect subsidization, it can fully be addressed through accounting mechanisms. There is simply no legitimate justification for requiring duplication of costs.

b. Physical Premises

The Court agrees with LSC that some degree of separate physical premises is justified to avoid the appearance of endorsement. In areas open to the public (for example, reception areas and conference rooms to meet with clients or to conduct depositions or interview witnesses), separate rooms are appropriate to serve this interest with, of course, appropriate signage. However, LSC's interest in avoiding the appearance of endorsement does not justify separate physical premises for areas not seen by the public. The Court believes, however, that permitting client contact with LSC and non-LSC clients in the same room, albeit at different times, is bound to create public confusion, and should not be countenanced.

With respect to avoiding indirect subsidization, the sharing of costs when common non-public physical facilities

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(Cont'd)
Cir.1997) (citations and quotations omitted), and a responsibility "to mould each decree to the necessities of the particular case." *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 806 (2d Cir.1981) (citations and quotations omitted).

are utilized, can readily be accommodated by simple timekeeping and accounting methods.

c. Employee Time

Similar to separate physical premises, the issue of employee time relates to both of LSC's asserted interests. However, these interests provide no sound reason to preclude sharing lawyers, provided they keep accurate records of the time served and monies spent on each file so that their salaries and costs can be properly apportioned, and they make the nature of their retention clear to their clients, adversaries and the courts. However, lawyers handling a case containing both restricted and non-restricted components must identify themselves as lawyers for the affiliate and charge all their time and costs to the affiliate for the duration of the case. Similarly, there is no reason to require separate executive directors or other office personnel, provided their salaries and expenditures are also properly allocated, and they identify the entity they represent when dealing with the public.

d. Intake

The intake issue principally implicates the appearance of endorsement. LSC does not take issue with plaintiff-grantees' proposal for a common intake mechanism. Indeed, it makes perfect sense that a prospective client should be directed to the proper office. The Court, however, agrees with LSC that "[a]s the point of entry for clients, a shared intake mechanism must clearly differentiate between the two entities" so that clients will "clear[ly] experience ... being directed to one of two separate organizations rather than

merely being routed within one entity." OLA External Opinion at 8. As for indirect subsidization,*613 the costs of the common intake mechanism should, once again, be proportionally shared, which also can readily be accommodated by simple timekeeping and accounting methods.

CONCLUSION

Plaintiffs' facial preliminary injunction applications regarding the Tenth Amendment and the class-action, attorney's-fees and solicitation claims are denied. Because the government-donor plaintiffs have no standing to assert their Tenth Amendment challenge, defendants' 12(b)(1) motion to dismiss is granted as to those plaintiffs. In respect to the remaining plaintiffs, defendants' 12(b)(1) motion is denied, but defendants' 12(b)(6) motion to dismiss their Tenth Amendment, class-action, attorney's-fees and solicitation claims is granted, since they are not legally cognizable.[25]

In respect to plaintiff-grantees' preliminary injunction applications regarding their as-applied challenges, LSC shall be enjoined from withholding federal funds from plaintiff-grantees and from precluding plaintiff-grantees from forming affiliates with their non-federal funds, provided plaintiff-grantees comply with the terms and conditions of their Clarified Proposal, as qualified by the Court; accordingly, defendants' 12(b)(1) and 12(b)(6) motions are denied in respect to those claims. Plaintiff-grantees have satisfied the

25. Even if the government-donor plaintiffs' Tenth Amendment claim were not dismissed for lack of standing, it would accordingly be dismissed for failure to state a claim.

"probability of success" standard "when a plaintiff seeks to enjoin governmental action taken in the public interest pursuant to a statutory or regulatory scheme," *Velazquez I*, 985 F.Supp. at 337 (citations omitted), and they are deemed to have suffered irreparable harm because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).[26]

SO ORDERED.

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26. In light of the Court's decision, and the extended history of this litigation, the parties shall notify the Court within 30 days from the date of filing whether there are any viable claims that remain and, if not, whether there is any reason why finality should not now be achieved by converting the preliminary injunction into a permanent injunction.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 28, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:

Docket Number:	05-0340-cv
Short Title:	Velazquez v. Legal Services Corp
DC Docket Number:	97-cv-182
DC:	EDNY (BROOKLYN)
DC Judge:	Honorable Frederic Block

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 28 day of December, two thousand six.

Before:

Hon. Richard J. Cardamone,
Hon Joseph M. McLaughlin,
Hon. Barrington D. Parker,
Circuit Judges.

Appendix D

Brooklyn Legal Services Corp. B and Legal Services for New York City, on their own behalf and on behalf of their clients, et al.,

Plaintiff-Appellee-Cross-Appellants,

Community Service Society of New York, Inc., et al.,

Plaintiff-Cross-Appellants,

Carmen Valazquez, et al.,

Plaintiffs,

v.

Legal Services Corporation,

Defendant-Appellant-Cross-Appellee,

United States of America,

Intervenor-Defendant-Appellant-Cross-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Plantiff-Appellee-Cross-Appellants. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

Appendix D

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Thomas Asreen, Acting Clerk

By: s/ [illegible]
Motion Staff Attorney

APPENDIX E — RELEVANT STATUTES

Pub. L. 104-134, 110 Stat. 1321
H.R. 3019
April 26, 1996

Omnibus Consolidated Rescissions and Appropriations Act of 1996

Legal Services Corporation

Payment to the Legal Services Corporation

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $278,000,000, of which $269,400,000 is for basic field programs and required independent audits carried out in accordance with section 509; $1,500,000 is for the Office of the Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients in accordance with section 509 of this Act; and $7,100,000 is for management and administration: Provided, That $198,750,000 of the total amount provided under this heading for basic field programs shall not be available except for the competitive award of grants and contracts under section 503 of this Act.

Administrative Provisions — Legal Services Corporation

* * *

Sec. 504. (a) None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide

financial assistance to any person or entity (which may be referred to in this section as a 'recipient')—

(1) that makes available any funds, personnel, or equipment for use in advocating or opposing any plan or proposal, or represents any party or participates in any other way in litigation, that is intended to or has the effect of altering, revising, or reapportioning a legislative, judicial, or elective district at any level of government, including influencing the timing or manner of the taking of a census;

(2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency;

(3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect;

(4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body;

(5) that attempts to influence the conduct of oversight proceedings of the Corporation or any person or entity receiving financial assistance provided by the Corporation;

(6) that pays for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, administrative expense, or related expense, associated with an activity prohibited in this section;

(7) that initiates or participates in a class action suit;

(8) that files a complaint or otherwise initiates or participates in litigation against a defendant, or engages in a precomplaint settlement negotiation with a prospective defendant, unless—

(A) each plaintiff has been specifically identified, by name, in any complaint filed for purposes of such litigation or prior to the precomplaint settlement negotiation; and

(B) a statement or statements of facts written in English and, if necessary, in a language that the plaintiffs understand, that enumerate the particular facts known to the plaintiffs on which the complaint is based, have been signed by the plaintiffs, are kept on file by the recipient, and are made available to any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and to any auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation:

Provided, That upon establishment of reasonable cause that an injunction is necessary to prevent probable, serious harm to such potential plaintiff, a court of competent jurisdiction may enjoin the disclosure of the identity of any potential plaintiff pending the outcome of such litigation or negotiations after notice and an opportunity for a hearing is

provided to potential parties to the litigation or the negotiations: Provided further, That other parties to the litigation or negotiation shall have access to the statement of facts referred to in subparagraph (B) only through the discovery process after litigation has begun;

(9) unless—

(A) prior to the provision of financial assistance—

(i) if the person or entity is a nonprofit organization, the governing board of the person or entity has set specific priorities in writing, pursuant to section 1007(a)(2)(C)(i) of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(2)(C)(i)), of the types of matters and cases to which the staff of the nonprofit organization shall devote time and resources; and

(ii) the staff of such person or entity has signed a written agreement not to undertake cases or matters other than in accordance with the specific priorities set by such governing board, except in emergency situations defined by such board and in accordance with the written procedures of such board for such situations; and

(B) the staff of such person or entity provides to the governing board on a quarterly basis, and to the Corporation on an annual basis, information on all cases or matters undertaken other than cases or matters undertaken in accordance with such priorities;

(10) unless—

(A) prior to receiving the financial assistance, such person or entity agrees to maintain records of time spent on each case or matter with respect to which the person or entity is engaged;

(B) any funds, including Interest on Lawyers Trust Account funds, received from a source other than the Corporation by the person or entity, and disbursements of such funds, are accounted for and reported as receipts and disbursements, respectively, separate and distinct from Corporation funds; and

(C) the person or entity agrees (notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)) to make the records described in this paragraph available to any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and to any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation;

(11) that provides legal assistance for or on behalf of any alien, unless the alien is present in the United States and is—

(A) an alien lawfully admitted for permanent residence as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));

(B) an alien who—

(i) is married to a United States citizen or is a parent or an unmarried child under the age of 21 years of such a citizen; and

(ii) has filed an application to adjust the status of the alien to the status of a lawful permanent resident under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), which application has not been rejected;

(C) an alien who is lawfully present in the United States pursuant to an admission under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157) (relating to refugee admission) or who has been granted asylum by the Attorney General under such Act;

(D) an alien who is lawfully present in the United States as a result of withholding of deportation by the Attorney General pursuant to section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h));

(E) an alien to whom section 305 of the Immigration Reform and Control Act of 1986 (8 U.S.C. 1101 note) applies, but only to the extent that the legal assistance provided is the legal assistance described in such section; or

(F) an alien who is lawfully present in the United States as a result of being granted conditional entry to the United States before April 1, 1980, pursuant to section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(7)), as in effect on March 31, 1980, because of persecution or fear of persecution on account of race, religion, or political calamity;

(12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political

activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration, including the dissemination of information about such a policy or activity, except that this paragraph shall not be construed to prohibit the provision of training to an attorney or a paralegal to prepare the attorney or paralegal to provide—

(A) adequate legal assistance to eligible clients; or

(B) advice to any eligible client as to the legal rights of the client;

(13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees;

(14) that participates in any litigation with respect to abortion;

(15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison;

(16) that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency [if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation;]

[Bracketed text overruled by Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) and removed by Pub. L. 107—77, 115 Stat. 748 (November 28, 2001).]

(17) that defends a person in a proceeding to evict the person from a public housing project if—

(A) the person has been charged with the illegal sale or distribution of a controlled substance; and

(B) the eviction proceeding is brought by a public housing agency because the illegal drug activity of the person threatens the health or safety of another tenant residing in the public housing project or employee of the public housing agency;

(18) unless such person or entity agrees that the person or entity, and the employees of the person or entity, will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action, and will not refer such nonattorney to another person or entity or an employee of the person or entity, that is receiving financial assistance provided by the Corporation; or

(19) unless such person or entity enters into a contractual agreement to be subject to all provisions of Federal law relating to the proper use of Federal funds, the violation of which shall render any grant or contractual agreement to provide funding null and void, and, for such purposes, the Corporation shall be considered to be a Federal agency and all funds provided by the Corporation shall be considered to be Federal funds provided by grant or contract.

(b) Nothing in this section shall be construed to prohibit a recipient from using funds from a source other than the Legal Services Corporation for the purpose of contacting, communicating with, or responding to a request from, a State or local government agency, a State or local legislative body or

committee, or a member thereof, regarding funding for the recipient, including a pending or proposed legislative or agency proposal to fund such recipient.

(c) Not later than 30 days after the date of enactment of this Act, the Legal Services Corporation shall promulgate a suggested list of priorities that boards of directors may use in setting priorities under subsection (a)(9).

(d)(1) The Legal Services Corporation shall not accept any non-Federal funds, and no recipient shall accept funds from any source other than the Corporation, unless the Corporation or the recipient, as the case may be, notifies in writing the source of the funds that the funds may not be expended for any purpose prohibited by the Legal Services Corporation Act or this title.

(2) Paragraph (1) shall not prevent a recipient from -

(A) receiving Indian tribal funds (including funds from private nonprofit organizations for the benefit of Indians or Indian tribes) and expending the tribal funds in accordance with the specific purposes for which the tribal funds are provided; or

(B) using funds received from a source other than the Legal Services Corporation to provide legal assistance to a covered individual if such funds are used for the specific purposes for which such funds were received, except that such funds may not be expended by recipients for any purpose prohibited by this Act or by the Legal Services Corporation Act.

(e) Nothing in this section shall be construed to prohibit a recipient from using funds derived from a source other than the Legal Services Corporation to comment on public rulemaking

or to respond to a written request for information or testimony from a Federal, State or local agency, legislative body or committee, or a member of such an agency, body, or committee, so long as the response is made only to the parties that make the request and the recipient does not arrange for the request to be made.

(f) As used in this section:

(1) The term 'controlled substance' has the meaning given the term in section 102 of the Controlled Substances Act (21 U.S.C. 802).

(2) The term 'covered individual' means any person who—

(A) except as provided in subparagraph (B), meets the requirements of this Act and the Legal Services Corporation Act relating to eligibility for legal assistance; and

(B) may or may not be financially unable to afford legal assistance.

(3) The term 'public housing project' has the meaning as used within, and the term 'public housing agency' has the meaning given the term, in section 3 of the United States Housing Act of 1937 (42 U.S.C. 1437a).

* * *

Appendix E

Pub. L. 104-208, 110 Stat. 3009
H.R. 3610
September 30, 1996

Omnibus Consolidated Appropriations Act, 1997

Legal Services Corporation

Payment to the Legal Services Corporation

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $283,000,000, of which $274,400,000 is for basic field programs and required independent audits; $1,500,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $7,100,000 is for management and administration.

Administrative Provision—Legal Services Corporation

* * *

SEC. 502. (a) Continuation of Requirements and Restrictions.—None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of—

(1) sections 501, 502, 505, 506, and 507 of Public Law 104-134 (110 Stat. 1321-51 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject

to the same terms and conditions as set forth in such sections, except that all references in such sections to 1995 and 1996 shall be deemed to refer instead to 1996 and 1997, respectively; and

(2) section 504 of Public Law 104-134 (110 Stat. 1321-53 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section, except that—

(A) subsection (c) of such section 504 shall not apply;

(B) paragraph (3) of section 508(b) of Public Law 104-134 (110 Stat. 1321-58) shall apply with respect to the requirements of subsection (a)(13) of such section 504, except that all references in such section 508(b) to the date of enactment shall be deemed to refer to April 26, 1996; and

(C) subsection (a)(11) of such section 504, shall not be construed to prohibit a recipient from using funds derived from a source other than the Corporation to provide related legal assistance to—

(i) an alien who has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty; or

(ii) an alien whose child has been battered or subjected to extreme cruelty in the United States by a spouse or parent of

the alien (without the active participation of the alien in the battery or extreme cruelty), or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parents consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty.

(b) Definitions.—For purposes of subsection (a)(2)(C):

(1) The term 'battered or subjected to extreme cruelty' has the meaning given such term under regulations issued pursuant to subtitle G of the Violence Against Women Act of 1994 ;(Pub. L. 103-322; 108 Stat. 1953).

(2) The term 'related legal assistance' means legal assistance directly related to the prevention of, or obtaining of relief from, the battery or cruelty described in such subsection.

Appendix E

Pub. L. 105-119, 111 Stat. 2440
H.R. 2267
November 26, 1997

Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998

* * *

Legal Services Corporation

Payment To The Legal Services Corporation

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $283,000,000, of which $274,400,000 is for basic field programs and required independent audits; $1,500,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $7,100,000 is for management and administration.

Administrative Provisions— Legal Services Corporation

* * *

SEC. 502. (a) CONTINUATION OF REQUIREMENTS AND RESTRICTIONS- None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of—

(1) sections 501, 502, 505, 506, and 507 of Public Law 104-134 (110 Stat. 1321-51 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions as set forth in such sections, except that all references in such sections to 1995 and 1996 shall be deemed to refer instead to 1997 and 1998, respectively; and

(2) section 504 of Public Law 104-134 (110 Stat. 1321-53 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section, except that—

(A) subsection (c) of such section 504 shall not apply;

(B) paragraph (3) of section 508(b) of Public Law 104-134 (110 Stat. 1321-58) shall apply with respect to the requirements of subsection (a)(13) of such section 504, except that all references in such section 508(b) to the date of enactment shall be deemed to refer to April 26, 1996; and

(C) subsection (a)(11) of such section 504 shall not be construed to prohibit a recipient from using funds derived from a source other than the Corporation to provide related legal assistance to—

(i) an alien who has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty; or

(ii) an alien whose child has been battered or subjected to extreme cruelty in the United States by a spouse or parent of the alien (without the active participation of the alien in the battery or extreme cruelty), or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty.

(b) DEFINITIONS- For purposes of subsection (a)(2)(C):

(1) The term 'battered or subjected to extreme cruelty' has the meaning given such term under regulations issued pursuant to subtitle G of the Violence Against Women Act of 1994 (Public Law 103-322; 108 Stat. 1953).

(2) The term 'related legal assistance' means legal assistance directly related to the prevention of, or obtaining of relief from, the battery or cruelty described in such subsection.

Appendix E

Public Law No. 109-108
119 Stat. 2290
H.R. 2862

November 22, 2005

An Act

Making appropriations for Science, the Departments of State, Justice, and Commerce, and related agencies for the fiscal year ending September 30, 2006, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2006, and for other purposes, namely:

* * *

TITLE V-RELATED AGENCIES

* * *

LEGAL SERVICES CORPORATION

PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, $330,803,000, of which $312,375,000 is for basic field programs and required independent audits; $2,539,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits

of recipients; $12,825,000 is for management and administration; $1,255,000 is for client self-help and information technology; and $1,809,000 is for grants to offset losses due to census adjustments.

ADMINISTRATIVE PROVISION-LEGAL SERVICES CORPORATION

None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of, sections 501, 502, 503, 504, 505, and 506 of Public Law 105-119, and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such sections, except that all references in sections 502 and 503 to 1997 and 1998 shall be deemed to refer instead to 2005 and 2006, respectively. . . .

Appendix E

Public Law No: 110-5
February 15, 2007

H.J.RES.20

Revised Continuing Appropriations Resolution, 2007
(Enrolled as Agreed to or Passed by Both House and Senate)

* * *

CHAPTER 9—SCIENCE, STATE, JUSTICE, COMMERCE, AND RELATED AGENCIES

DIVISION B—CONTINUING APPROPRIATIONS RESOLUTION, 2007

The following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for fiscal year 2007, and for other purposes, namely:

TITLE I—FULL-YEAR CONTINUING APPROPRIATIONS

Sec. 101. (a) Such amounts as may be necessary, at the level specified in subsection (c) and under the authority and conditions provided in the applicable appropriations Act for fiscal year 2006, for projects or activities (including the costs of direct loans and loan

guarantees) that are not otherwise provided for and for which appropriations, funds, or other authority were made available in the following appropriations Acts:

* * *

(8) The Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006.

* * *

CHAPTER 9—SCIENCE, STATE, JUSTICE, COMMERCE, AND RELATED AGENCIES

Sec. 20918. Notwithstanding section 101, the level for 'Legal Services Corporation, Payment to the Legal Services Corporation' shall be $348,578,000.

APPENDIX F — LEGAL SERVICES CORPORATION REGULATIONS

45 C.F.R. § 1610.8

1610.8 Program integrity of recipient.

(a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:

(1) The other organization is a legally separate entity;

(2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and

(3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:

(i) The existence of separate personnel;

(ii) The existence of separate accounting and timekeeping records;

(iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and

Appendix F

(iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.

(b) Each recipient's governing body must certify to the Corporation within 180 days of the effective date of this part that the recipient is in compliance with the requirements of this section. Thereafter, the recipient's governing body must certify such compliance to the Corporation on an annual basis.

APPENDIX G — PETITIONERS' FIRST CONFIGURATION PROPOSAL OF APRIL 25, 2003

Configuration Proposal

Each grantee-plaintiff"[18] submits for review by the Legal Services Corporation ("LSC") the following proposal designed to satisfy LSC's program integrity regulations, while respecting the First Amendment protection afforded to grantees and donors to utilize their non-LSC funds free from "undue burdens" imposed by the government.

1. **Legal separation:** Each grantee-plaintiff (the "LSC grantee affiliates") seeks permission to establish a legally separate, separately incorporated affiliate (occasionally referred to in this memorandum as the "non-LSC grantee affiliate") to receive and administer funds received from sources other than LSC. The non-LSC grantee affiliate will be authorized to provide all forms of legal representation to clients consistent with its mission. The LSC grantee affiliate will restrict its activities to forms of representation permitted by the LSC Act and LSC appropriations bills.

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18. The phrase "grantee plaintiffs" includes the current grantees Legal Services for New York City and South Brooklyn Legal Services, each of which receives support from LSC, as well as substantial support from private and other government donors. The phrase "grantee plaintiffs" also includes the former grantee Farmworker Legal Services of New York, which now receives all of its support from private and other government donors, and which submits this proposal with the understanding that, if it is approved, or if the Court rules that LSC must permit the operation of this configuration, it will be eligible to re-apply for LSC funding.

2. **Easily distinguishable names:** The non-LSC grantee affiliate will be named in a manner that conveys its separate legal, financial and programmatic status.

3. **Separate Boards of Directors:** The two affiliates will maintain separate governing structures, including separate Boards of Directors. The membership of the non-LSC grantee affiliate Board of Directors may consist of some or all of the persons who sit on the LSC grantee Board of Directors.

4. **Non-subsidization:** The two affiliates will ensure that LSC funds do not subsidize activities that the LSC Act or LSC appropriations bills bar LSC from funding. The actual economic cost of all other activities will be borne by the non-LSC grantee affiliate, unless LSC explicitly permits the LSC grantee to use non-LSC funds for those purposes. The two affiliates will adopt and utilize accounting procedures to ensure that each affiliate bears a fair and accurate proportionate share of all fixed and variable expenses incurred during the joint operation of the affiliates.

   The accounting procedures that both affiliates will follow to ensure that LSC funds do not subsidize activities that the LSC Act or LSC appropriations bills bar LSC from funding will include the following established procedures:[19]

---

19. LSC has already found these procedures to be adequate to ensure that LSC funds are not used to pay for certain non-LSC funded (Cont'd)

a) All procedures that the LSC grantee plaintiffs currently utilize to satisfy LSC's accounting regulation, which requires LSC grantees to ensure that "[n]o funds made available by the Corporation shall be used to pay for administrative overhead or related costs associated with" certain specified activities. 45 C.F.R. § 1612.10.

b) All procedures that the LSC grantee plaintiffs currently utilize to satisfy LSC's cost allocation regulation, which permits LSC grant recipients to allocate costs to their LSC grant only if they can demonstrate that the cost is "[i]n compliance with" the appropriations and LSC Act restrictions on grantee activities, and only if the costs benefit the grant. 45 C.F.R. § 1630.3(a)(4), (c).

5. **Employee timekeeping measures:** All legal personnel employed by either affiliate and spending

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activities that are currently performed in the same offices and with the same personnel as are utilized to perform LSC-funded activities. *See* 62 Fed. Reg. 68219, 68221-68222 (Dec. 31, 1997) (acknowledging that the procedures mandated by the cost allocation regulation permit LSC grantees to account for both direct costs, such as attorney time, and indirect costs, such as a proportion of the cost of renting space used to serve clients under the LSC grant, so as to ensure that the LSC grant is charged for only those activities attributable to it); 45 C.F.R. § 1612.10 (requiring LSC grantees to use accounting procedures adequate to ensure that "[n]o funds made available by the Corporation shall be used to pay for administrative overhead or related costs associated with" certain specified activities).

any time on LSC-funded activities will maintain time records of their activities to ensure that accurate summaries of their activities are readily available in order to ensure that LSC funds are not expended for activities that the LSC Act or LSC appropriations bills bar LSC from funding. The records will be sufficient to satisfy LSC's timekeeping regulation, which requires that "[t]ime records must be created contemporaneously and account for time by date and in increments not greater than one-quarter of an hour which comprise all of the efforts of the attorneys and paralegals for which compensation is paid by the recipient." 45 C.F.R. § 1635.3(b). In accordance with LSC regulations, for accounting purposes employee time may be allocated based on personnel activity reports, which are prepared monthly, and which contain a reasonable, after-the-fact estimate of the distribution of the activities of each compensated employee whose time is charged directly to an LSC grant. 45 C.F.R. § 1630.3(d).

6. **Signage and Disclaimers:** The two affiliates will ensure that clients, judges, government officials and the general public are informed that the affiliates are separate, independent non-profit corporations, and that LSC neither endorses nor funds any of the activities of the non-LSC grantee affiliate. Notification will include the prominent display of the separate names of the affiliates, including separate letterheads, business cards, and litigation backs. It will also include prominently displayed signage on the front doors, in the waiting areas, in

conference rooms, and in attorney offices explaining that the affiliates are separate, independent non-profit corporations, and that LSC neither endorses nor funds any activities of the non-LSC grantee affiliate. A written explanation will be made available to all persons entering the premises of the program explaining that the affiliates are separate, independent non-profit corporations, and that LSC neither endorses nor funds any activities of the non-LSC grantee affiliate. Letters will be filed with courts, agencies and government officials that routinely come into contact with either affiliate explaining that the affiliates are separate, independent non-profit corporations, and that LSC neither endorses nor funds any activities of the non-LSC grantee affiliate. Contacts with the media will specify whether the activity in question is funded by LSC, and will explain the affiliates are separate, independent non-profit corporations, and that LSC neither endorses nor funds any activities of the non-LSC grantee affiliate.

7. **Equipment:** The two affiliates will share equipment, such as telephone lines, computers, case management systems, libraries, legal research facilities, office furnishings, printers, fax machines, and web sites. Each affiliate will bear its fair and accurate share of the costs attributed to any shared equipment, pursuant to the accounting procedures described in paragraph 4. Notices and disclaimers will be displayed making it clear that the non-LSC grantee affiliate is not expending LSC funds in

connection with activities that the LSC Act or LSC appropriations bills bar LSC from funding, pursuant to the signage and disclaimer measures described in paragraph 6.

8. **Physical premises:** The two affiliates may operate in the same physical premises. The affiliates will utilize the accounting measures described in paragraph 4 above to allocate the cost of rental or ownership between the two affiliates in a fair and accurate manner that reflects usage.

9. **Employee time:** The two affiliates may share legal, support and supervisory personnel (including an Executive Director, who may direct both programs), who may work part-time for each affiliate. Pursuant to the accounting procedures described in paragraph 4, and the time records described in paragraph 5, the cost of personnel will be allocated between the LSC grantee affiliate and the non-LSC grantee affiliate in strict compliance with the nature of the activities undertaken. No activity that the LSC appropriations bills bar LSC grantees from performing will be allocated to the LSC grantee. No employee may engage in activities barred by the LSC restrictions during time paid for with LSC funding.

10. **Intake:** The two affiliates may share a common intake and allocation mechanism to refer clients and cases between the two affiliates at the commencement of any representation, and as the representation proceeds. The affiliates will ensure

that the LSC grantee does not bear more than its fair share of the intake and allocation mechanism in accordance with usage.

APPENDIX H — PETITIONERS' CLARIFICATION OF APRIL 25, 2003 PROPOSAL

Clarification of April 25, 2003 Proposal

May 22, 2003

The grantee-plaintiffs[1] each submit this document to clarify their April 25. 2003 Configuration Proposal in response to questions raised by the Legal Services Corporation ("LSC") in its May 9, 2003 letter to the Court.[2] Each of the grantee-plaintiffs desires authorization from LSC to operate affiliate organizations pursuant to their April 25, 2003 proposal as clarified herein:

1. **Legal separation** - Each of the grantee-plaintiffs (also referred to as "LSC grantee affiliates") proposes to establish a legally separate corporation (the "non-LSC grantee affiliate") with its own articles of incorporation and bylaws, in accordance with the laws of the State of New York.

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1. The phrase "grantee-plaintiffs" refers to Legal Services for New York City ("LSNY"), South Brooklyn Legal Services, and Farmworker Legal Services of New York.

2. As instructed by the Court, the grantee-plaintiffs each submitted their Configuration Proposal for review by LSC on April 25. 2003. *See* Ltr. from Burt Neuborne to the Hon. Frederic Block, U.S.D.J., dated April 25, 2003. Two weeks later, LSC rejected the grantee-plaintiffs' Configuration Proposal. *See* Ltr. from Stephen Ascher to the Hon. Frederic Block, U.S.D.J.. dated May 9, 2003 (attaching LSC External Opinion # EX-2003-1008. LSC Office of Legal Affairs, dated May 8, 2003).

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2. **Easily distinguishable names** - The LSC grantee affiliates propose, at this time, to use the following names for each respective non-LSC grantee affiliate:[3]

LSC grantee affiliate	*Non-LSC grantee affiliate*
Legal Services for New York City	New York City Justice Center
South Brooklyn Legal Services	South Brooklyn Justice Center
Farmworker Legal Services of New York	Farmworker Justice Center

3. **Separate boards of directors** - The boards of directors of the LSC grantee affiliates, and of the non-LSC grantee affiliates, will be separate: a) the boards of the respective LSC and non-LSC affiliates will meet separately and maintain separate records; and b) the membership of the boards of directors of the LSC and non-LSC affiliates will be coextensive at the outset,[4] but this may change

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3. The plaintiff-grantees are willing to confer with LSC, at its request, on the exact names of each non-LSC grantee affiliate.

4. LSC's program integrity regulation expressly permits an LSC grantee to control the activities of its non-LSC grantee affiliate through such overlapping board membership, as is required by the First Amendment. *See Legal Aid Soc'y of Haw. v. Legal Servs.* Corp., 981 F. Supp. 1288, 1297 (D. Haw. 1997); Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 62 Fed. Reg. 27695, 27697 (May 21, 1997) (codified at 45 C.F.R. § 1610) (stating that "because the [LSC program integrity] standards will allow control

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over time depending on various factors. Moreover, plaintiff-grantee LSNY would prefer to operate through an affiliate structure in which LSNY would possess authority to determine the composition of the board of the New York City Justice Center.

4. **No subsidy** - No LSC grantee affiliate will transfer any LSC funds to a non-LSC grantee affiliate.[5] Affiliated organizations will apportion fair value for expenses in accordance with generally accepted accounting principles and the requirements of the LSC Accounting Guide for LSC recipients, the LSC Office of Inspector General Audit Guide for Recipients and Auditors, and LSC regulation 45 C.F.R. § 1630, Cost Standards and Procedures, which provides "uniform standards for allowability of costs" charged to LSC grants, including both direct costs (e.g., salaries) and indirect costs (e.g., utilities and other forms of overhead costs). In particular, affiliated organizations will allocate indirect costs pursuant to 45 C.F.R. § 1630.3(f), which governs the allocation of indirect costs by LSC grantees, and by separately identifying the total costs for restricted

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at the Board level, recipients will have an avenue through which to engage in restricted activities"): LSC, Guidance in Applying the Program Integrity Standards, attached to LSC External Opinion # EX-2003-1008 ("A recipient may have the same or overlapping Board of Directors as another organization which engages in restricted activity.").

5. *See* LSC External Opinion at 8 (requesting explicit statement concerning no transfer of LSC funds).

activities and treating these costs as disallowed costs pursuant to 45 C.F.R. § 1630.2(d).[6]

5. **Employee timekeeping measures** - Any employee in the category of "legal personnel" who is employed part-time by an LSC grantee affiliate and by a non-LSC grantee affiliate will maintain detailed time records for the work performed for each affiliate. These records will comply with LSC's timekeeping regulation, 45 C.F.R § 1635, including the requirement that an LSC grantee:

> shall require any attorney or paralegal who works part-time for the recipient and part-time for an organization that engages in restricted activities to certify in writing that the attorney or paralegal has not engaged in restricted activity during any time for which the attorney or paralegal was compensated by the recipient or has not used recipient resources for restricted activities. The certification requirement does not apply to a *de minimis* action related to a restricted activity.

45 C.F.R. § 1635.3(d).

Additionally, any employee in the category of "non-legal personnel" (i.e.. support personnel) who is employed part-time by an LSC grantee affiliate and by a non-LSC grantee affiliate, will maintain personnel activity reports, pursuant to LSC regulation 45 C.F.R. § 1630.3(d), for work performed

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6. *See LSC* External Opinion at 9 (requesting "some sense" of how apportionments will be made).

for each affiliate. The regulation, which provides standards governing allowability of costs under LSC grants or contracts, incorporates the detailed guidance about personnel activity reports contained in Office of Management and Budget ("OMB") Circular A-122, Cost Principles for Non-Profit Organizations, Attachment B, para. 6(1)(2) (Aug. 29, 1997), a copy of which is attached hereto as Ex. 1.[7]

No legal personnel, and no non-legal personnel, will engage in any LSC-funded activities while working as an employee of a non-LSC grantee affiliate.[8]

6. **Signage and disclaimers** - A "disclaimer" will be provided in writing individually to all clients, prospective clients, opposing attorneys and other visitors entering the premises of the LSC grantee affiliate and of the non-LSC grantee affiliate. The disclaimer will also be provided in writing individually to all clients and

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7. LSC itself has determined that these timekeeping and cost allocation rules are adequate to ensure that no LSC funds are spent to directly or indirectly subsidize certain privately funded activities, such as lobbying a state legislature for increased legal services funding, that LSC grantees are permitted to conduct in the same offices and with the same employees as they conduct their LSC-funded activities. *See* Ltr. from Burt Neuborne to the Hon. Frederic Block, U.S.D.J., dated April 25, 2003, at 5-6 & nn.12, 13.

8. This point responds to LSC's stated concern that "[i]f any personnel of the non-LSC affiliate engage in LSC-funded activities then the non-LSC affiliate is subject to LSC restrictions." *See* LSC External Opinion at 4 n.3. In fact, performance of work in such circumstances would seem to have the opposite effect, as it would constitute a subsidy of the LSC grantee by the non-LSC affiliate.

prospective clients who otherwise meet in-person with an employee of an affiliate. The written disclaimer will be printed on an 8.5 x 11 inch sheet of paper in 12-point type. It will also be published on web sites maintained by the affiliates and in the places and manners described in paragraph six of the grantee-plaintiffs' April 25, 2003 proposal.

An oral disclaimer will be made in-person, and in telephone communications, to all individual clients and prospective clients. In addition to the written disclaimers to courts and government officials provided in paragraph six of the grantee-plaintiffs' April 25, 2003 proposal, disclaimers will also be made orally to all individual judges, opposing attorneys, government officials, journalists and others who come into contact with either affiliate.

For example, South Brooklyn Legal Services and the affiliated South Brooklyn Justice Center will present the following written and oral disclaimer (or a disclaimer containing similar text to the same effect) to all clients, prospective clients, and others identified above in this paragraph six:

> South Brooklyn Legal Services ("SBLS") and the South Brooklyn Justice Center (the "Justice Center") are separate, independent non-profit corporations. SBLS receives funds from the Legal Services Corporation ("LSC") to provide certain approved categories of legal assistance. Use of these funds from LSC is restricted by federal law. The Justice Center does not receive any LSC

> funds. Congress has refused to allow LSC funds to be used to finance the work of the Justice Center. Nevertheless, SBLS and the Justice Center cooperate to serve the legal needs of low-income individuals and families in South Brooklyn.[9]

In addition, the non-LSC grantee will include the following disclaimer (or similar text to the same effect) in all client retainer agreements:

> I have read and understood the following: The South Brooklyn Justice Center (the "Justice Center") is representing me. The Justice Center does not receive any Legal Services Corporation ("LSC") funds. Congress has refused to allow LSC funds to be used to finance the work of the Justice Center.

In addition, the LSC grantee will include the following disclaimer (or similar text to the same effect) in all client retainer agreements:

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9. This text derives in part from a disclaimer that the LSC Office of Inspector General ("OIG") has required to be published, in accordance with the LSC program integrity regulation, on a web site shared by an LSC grantee affiliate and a non-LSC grantee affiliate in Oregon. *See* Lane County Legal Aid Service and Lane County Law and Advocacy Clinic homepage, *at* http://www.lanecountylegalservices.org/ (last visited May 19, 2003), attached hereto as Ex. 2; LSC OIG, Review of Grantee's Transfer of Funds, and Compliance with Program Integrity Standards, Grantee: Lane County Legal Aid Service, Inc., Report No. AU 02-01 (Oct. 2001), attached as Ex. 26 to Decl. of Laura K. Abel, dated Dec. 14, 2001.

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I have read and understood the following: South Brooklyn Legal Services ("SBLS") is representing me. SBLS receives funds from the Legal Services Corporation ("LSC") to provide certain approved categories of legal assistance. Federal law restricts the use of these LSC funds and all other funds provided to SBLS.

Affiliates will produce these disclaimers in both English and Spanish, and will, pursuant to existing office policies, provide additional translation into other languages.

7. **Equipment** - The respective affiliates propose to share equipment and physical resources, including, telephone lines, computers, case management systems, libraries, legal research facilities, office furnishings, printers, fax machines and web sites.

8. **Physical premises** - The respective affiliates propose to operate in one physical location with no physical separation beyond that degree of physical separation required of other non-profit federal grantees by Presidential Executive Order No. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002), entitled Equal Protection of the Laws for Faith-based and Community Organizations. The standards contained in Executive Order No. 13279, applied in the context of legal services programs, would permit the LSC and non-LSC affiliates to operate in a single physical location, but would require the non-LSC grantee affiliate to provide LSC-restricted services "separately in time or location from any programs or services supported" with LSC funds. *Id.*

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More specifically, these standards would require for example that a non-LSC grantee affiliate conduct its LSC-restricted activities either in a room separate from any room in which its LSC grantee affiliate is simultaneously conducting LSC-approved activities, or in the same room but at separate times. *See* White House Office of Faith-Based and Community Initiatives, Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government, p. 7 (Dec. 12, 2002), attached as Ex. B to Decl. of Laura K. Abel, dated March 6, 2003.

9. **Employee time** - The LSC and non-LSC affiliates propose to share all legal, support and supervisory personnel (including an Executive Director, who will direct both programs). No personnel will engage in LSC-funded activities while working in the capacity as an employee of a non-LSC grantee affiliate.

10. **Intake** - The respective affiliates propose to share a common intake and allocation mechanism to refer clients and cases between the affiliates. As described in paragraph six above, an individual disclaimer will be provided to each individual client or prospective client who contacts either affiliate.

APPENDIX I — LEGAL SERVICES CORPORATION, OFFICE OF LEGAL AFFAIRS EXTERNAL OPINION # EX-2003-1008

To: Legal Services of New York City, South Brooklyn Legal Services, Farmworker Legal Services of New York, c/o The Brennan Center.

Date: May 8, 2003

Subject: Part 1610 Program Integrity Configuration Proposal

ISSUES PRESENTED

Would the arrangement set forth in the April 25, 2003 "Configuration Proposal" from the Brennan Center establish sufficient Part 1610 program integrity between an LSC grantee and an entity engaged in LSC restricted activities.

SUMMARY

The Configuration Proposal fails to offer sufficient details for a full Part 1610 program integrity analysis. Such an analysis would require more specific descriptions of how the arrangement would work, as were provided in the referenced 1997 Queens situation. The Queens inquiry contained definite statements as to how Legal Services of New York City (LSNY), Queens Legal Services, and Queens II would work together. This proposal fails to do so. Instead, many critical factual areas are left unspecified or allow that the entities "may" overlap.

Given these vagaries, LSC can only evaluate the proposal with the conservative assumption that the two entities would have the minimum of separation possible within the description. In that situation, the grantee would fail to have program integrity from the other entity due to a lack of physical and financial separation and insufficient specificity as to the other program integrity factors. Nonetheless, the proposal is so broadly phrased that it might be implemented in a way that would maintain program integrity.

FACTS

On April 25, 2003, the Brennan Center submitted a "Configuration Proposal" (Proposal) to the United States District Court for the Eastern District of New York regarding possible affiliation between certain LSC grantees and other entities engaged in LSC restricted activities. While the Proposal was not directed to LSC, it was copied to LSC's attorneys and was apparently meant as a submission for LSC's evaluation. The Brennan Center also attached a copy of the 1997 Queens Legal Services proposal from LSNY to LSC and the response from LSC to LSNY.

The four-page proposal is attached and incorporated into this opinion letter. In brief, the proposal is from LSNY, its subgrantee South Brooklyn Legal Services, and Farmworker Legal Services of New York, a former LSC grantee that apparently would re-apply for LSC funding if it could set up an affiliate as described therein. The proposal states that each of those three organizations "seeks permission to establish a legally separate, separately incorporated affiliate ... to receive and administer funds received from sources other

than LSC" and provide services that may include LSC restricted activities. The proposal then describes how the relationships between the LSC grantees and the non-LSC entities would be structured including many areas of overlapping staff, equipment, offices, governing bodies, etc.

ANALYSIS

Unlike the 1997 Queens Legal Services situation, this proposal is generally conclusory in nature and lacks sufficient facts and details for a full program integrity analysis. It states that the other organization(s) will be established and the relationship between the recipients and other respective organizations will be maintained in such a manner as to meet the program integrity tests set forth in the regulation, but it provides very little in the way of specific factual detail as to how those goals are to be accomplished. In light of the highly fact-specific nature of a program integrity analysis, as described below, LSC cannot provide a definitive assessment of whether the proposal could satisfy the requirements set forth at 45 CFR Part 1610. Furthermore, the Queens proposal was an actual situation presented to LSC by LSNY. This proposal is a blanket hypothetical from a group that includes a non-grantee (Farmworker Legal Services), rather than something that contains actual plans.

Part 1610 Program Integrity Regulation

Section 1610.8(a) requires recipients to have "objective integrity and independence from any organization that engages in restricted activities." The regulation specifies three separate factors, each of which must be met, for a recipient

to be determined to have objective integrity and independence from such an organization.[1] First, the organizations must be legally separate entities. 45 CFR §1610.8(a)(1). Generally, this factor is simple to satisfy if the two organizations are legally created independent corporations, although the separation must be more than a legal fiction. Second, there can be no transfer of LSC funds from the recipient to the other organization and LSC funds cannot subsidize restricted activities. 45 CFR §1610.8(a)(2). For the purposes of Part 1610, a "subsidy" is

> a payment of LSC funds to support, in whole or part, a restricted activity conducted by another entity, or a payment to another entity to cover overhead, in whole or in part, relating to a restricted activity. A recipient will be considered to be subsidizing the restricted activities of another organization if it provides the use of its LSC-funded resources to the organization without receiving a "fair-market price" for such use.

62 Fed. Reg. 27698 (May 21, 1997) (preamble to final rule).

Finally, the organizations must be physically and financially separate. 45 CFR § 1610.8(a)(3). Physical and

1. Part 1610, it should be noted, does not affirmatively require grantees to establish or maintain separate organizations. Rather, it sets forth the parameters which grantees must abide by in their dealings with organizations that engage in restricted activities, including, but not restricted to, situations in which grantees choose to use their non-LSC funds to help establish or maintain such organizations. Grantees are always free to refrain from providing funds to, or otherwise working with, such organizations.

financial separation is characterized by a variety of indicia, including but not limited to:

(1) the existence of separate personnel;

(2) the existence of separate accounting records:

(3) the degree of separation from facilities in which restricted activities occur and the extent of such restricted activities: and

(4) the extent to which signs and other forms of identification which distinguish the recipient from the other organization are present.

Physical and financial separation is the most nuanced and complex of the three factors that the regulation requires be met. Whether physical and financial separation exists is determined on a case-by-case basis, based on the totality of the circumstances. Individual factors present in one situation might be acceptable in the context of the overall relationship between the entities although they might be unacceptable in another situation in which other factors weigh more heavily against a finding of sufficient separation. However, in all situations the separation between the organizations must be clear to clients, courts, agencies and others with whom the recipient comes into contact, and to the general public. It is also important to note that the financial separation requirement is distinct from the non-subsidization requirement. While bookkeeping can demonstrate a lack of subsidization, the regulation explicitly states that mere bookkeeping separation is insufficient to meet the physical

and financial separation requirement. Taken together, the recipient and the other organization engaged in LSC restricted activities must operate as two separate entities (that may collaborate) and cannot operate as essentially one entity with administrative separation on paper. In addition to Part 1610, LSC has issued a program letter on October 30, 1997 with "Guidance in Applying the Program Integrity Standards" (attached) as well as numerous OLA program integrity opinions responding to questions from LSC grantees.

Actual Part 1610 compliance, as with most regulatory requirements, cannot he determined in advance. Even the best laid plans to ensure program integrity are dependant on implementation. LSC's advance evaluations can only say if the described situation, independent of any other factors not mentioned, would comply with Part 1610 if implemented as described.

Proposal of April 25, 2003

Legal Separation of Organizations

Paragraph I (Legal separation) of the proposal addresses this factor, seeking "permission" from LSC on behalf of certain recipients to establish legally separate incorporated affiliates. LSC does not grant "permission" to recipients to establish separate incorporated affiliates. The grantees have the authority to do this on their own; many grantees have either done so or have close relationships with non-LSC entities. If a recipient chooses to establish an affiliate organization that intends to engage in restricted activities, then the recipient must ensure that the affiliate is a legally

separate entity in order for the recipient to be in compliance with Part 1610. We understand the proposal to mean that the affiliate organization would be a legally separate corporation, with its own articles of incorporation and bylaws, established in accordance with the laws of the State of New York. If this is the case, it would appear that the first factor, legal separation, would be met.

Transfer and Subsidization

Paragraphs 4 (Non-subsidization), 5 (Timekeeping), 7 (Equipment), 8 (Physical Premises), 9 (Time) and 10 (Intake) of the proposal implicate transfer and subsidization issues. As discussed above, Part 1610 prohibits a recipient from transferring LSC funds to an entity engaging in restricted activities or subsidizing restricted activities.[2] The proposal does not specifically state that there will be no transfer of LSC funds to the non-LSC entities, but it appears that no transfer is planned.[3] A subsidy can occur directly, as

2. A transfer of LSC funds from an LSC grantee to another entity would cause the other entity to be subject to LSC restrictions. 45 CFR §1610.7. The only exception to this rule is for transfers of LSC funds for private attorney involvement activities pursuant to 45 CFR Part 1614. *Id.* at 1610.7(c).

3. For purposes of this analysis, we assume that Paragraph 5 (Timekeeping) contains a misstatement. It begins "[a]ll legal personnel employed by either affiliate and spending any time on LSC-funded activities will maintain time records . . . ." If any personnel of the non-LSC affiliate engage in LSC-funded activities then the non-LSC affiliate is subject to LSC restrictions and further program integrity analysis would be moot. We will assume that the

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through the payment of LSC funds to the entity for any reason, or indirectly, as through permitting the use by the entity of LSC-funded resources without receipt of a "fair-market" value for the use. The cost-sharing goals in these specific paragraphs are consistent with the non-subsidization requirement of the regulation. More specific information on accounting for non-legal personnel time would be, however, necessary, as Paragraph 5 (Employee timekeeping measures) does not address timekeeping for non-legal (i.e., support) personnel. The timekeeping provisions of the proposal do not state if there will be any effort to document the work done at the non-LSC entity by employees who work for both organizations. Such information would be useful as further indicia that the LSC grantee is not subsidizing the non-LSC entity by documenting that work on restricted activities is being undertaken by the shared employees only in their capacity as employees of the non-LSC entity. Similarly the LSC grantee should be able to show that no LSC funded resources are used for restricted activities. Information on how the affiliate organizations will apportion value for expenses would be useful. While certain expenses can be tracked with relative case (such as use of fax machines, phones, copiers, etc.) other expenses may be harder to apportion (such as utilities, website costs, etc.), particularly to the extent that the organizations expect to share equipment and facilities. It would be helpful to us in conducting a Part 1610 assessment to have some sense of how it is intended that those apportionments be made.

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proposal meant that any legal personnel working for both the LSC grantee and the non-LSC affiliate will maintain required time records for their work at the LSC grantee. If this is in error, then clarification is necessary.

Appendix I

The proposal inaccurately cites 45 CFR Part 1612 as if it were a general accounting regulation and mischaracterizes Part 1630 as an accounting regulation. Part 1612 deals with specific restrictions on the use of LSC funds for lobbying on legislative and regulatory proposals and §1612.10 sets forth recordkeeping requirements to document compliance with that Part. Part 1612 and §1612.10 do not impose generally applicable accounting requirements related to other restrictions. LSC's general accounting standards are found in the LSC Accounting Guide for LSC Recipients. Moreover. LSC's Cost Standards and Procedures regulations at 45 CFR Part 1630, while providing useful information on cost allocations standards for LSC funds, do not constitute an "approval" of any specific accounting procedures. Regardless of any Part 1610 issues, all grantees must fully comply with Parts 1612 and 1630. The requirements of these, and other regulations, may be helpful in determining program integrity, but Part 1610 may require additional documentation beyond the requirements of other LSC regulations. For example the LSC timekeeping requirements arc not structured to provide the kind of information that might be necessary to demonstrate compliance with the transfer, subsidy, and physical and financial separation standards.

Physical and Financial Separation

Paragraphs 2 (Names), 3 (Boards), 5 (Timekeeping), 6 (Signage), 7 (Equipment), 8 (Physical Premises), 9 (Time) and 10 (Intake) of the proposal implicate physical and financial separation issues. As noted above, the physical and financial separation analysis is a fact-specific totality of the circumstances analysis that requires consideration of all of

the different indicia of separation (the most important of which are identified in the regulation as discussed above), taken together. The proposal does not contain sufficient detail regarding several of the indicia to make a definitive determination. LSC must evaluate the proposal based on the minimum amount of separation consistent with the broad parameters that it sets out. On the basis of the information provided, the proposal does not meet the physical and financial separation standard, for many of the same reasons the 1997 Queens Legal Services situation was rejected. Nonetheless, LSC is prepared to reevaluate this proposal if sufficient additional detailed information is provided that clarifies or eliminates some of the issues discussed below.

For the purpose of understanding which aspects of the proposal are either lacking in detail or indicate a lack of physical and financial separation, the specific aspects of the proposal touching on physical and financial separation are discussed in greater detail below. The overall conclusion regarding the physical and financial separation analysis does not hinge on any single factor; rather the entire situation is considered as a whole.

Paragraph 2 (Names) states that the "non-LSC grantee affiliate will be named in a manner that conveys its separate legal, financial and programmatic status." While this is good as a stated goal, LSC needs the actual names of the grantee and the new entity to make a determination whether the names to be used will, in fact, sufficiently convey the separate legal, financial and programmatic status of the affiliate organization. In the Queens situation, the affiliate

organization was named "Queens Legal Services II" - a name which LSC found insufficient, in light of the other ways in which the organizations were not separate, to convey separate legal financial and programmatic status to clients, courts, agencies the public and others with whom Queens Legal Services would be dealing.

Paragraph 3 (Boards) states that the "Membership of the non-LSC grantee affiliate Board of Directors *may consist of some or all* of the persons who sit on the LSC grantee Board of Directors" (emphasis added). Part 1610 permits the overlap of governing Boards between recipients and other entities engaged in restricted activities. However, the proposal gives no indication of the extent of the intended overlap and explicitly contemplates that there could be 100% overlap. Again, relative Board composition is viewed in the overall context of the relationship, but a 100% overlapping Board would indicate far less physical and financial separation than would Boards having less that 50% overlap, for example. Moreover, the proposal does not speak to the independence of action between the two Boards. For example, would each Board meet separately and maintain separate records? To what extent, if at all would the Board of one organization have the ability to direct the policies, employees and activities of the other? Would there be a Memorandum of Understanding between the organizations setting forth the contractual obligations between the parties? Would the board of one have the power to appoint the members of the other? What would it say? Clarification of these issues would be needed before LSC could adequately determine how this

factor would weigh in the overall physical and financial separation analysis.[4]

Paragraph 5 (Timekeeping). As described in the *Transfer and Subsidization* section above, the proposal appears to state that legal personnel working on LSC funded matters will keep time in a manner consistent with the LSC timekeeping regulation. To demonstrate physical and financial separation, it would be helpful for *each* organization to require *its own* legal employees to keep detailed time records of work performed. Such an arrangement would bolster the case for physical and financial separation as described above. This paragraph, however, does not address timekeeping for non-legal (i.e., support) personnel. It would be helpful to have clarification of this issue. Furthermore, as mentioned above, Part 1610 compliance may require tracking information beyond what the LSC timekeeping regulation mandates (and which would be unnecessary if imposed on all LSC grantees, even those without affiliations raising Part 1610 questions).

Paragraph 6 (Signage), similar to paragraph 2, contains a conclusory statement that signage and disclaimers will be

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4. For example, LSNY is currently restructuring itself in a way that would raise considerable Part 1610 issues if it were to extend to entities engaged in restricted activities. As LSNY has explained to LSC, the new structure will make the former grantees "child" corporations to LSNY as the corporate "parent." LSNY will be the sole member of the child corporations. will have extensive control over their management and will directly employ staff at the child corporations. While this structure is completely permissible among entities that do not engage in restricted activities, it could be problematic for LSNY to apply it to an entity doing LSC restricted work depending on the totality of the circumstances.

sufficient to demonstrate the separate identities of the respective organizations, but fails to describe sufficiently what the signage and disclaimers would say or where they would be placed. Some of the information provided, such as the statements regarding signage to be displayed on the front doors and waiting areas and contacts with the media would be positive indicia of separation. However, there are other aspects which need clarification. For example, the proposal states that a "written explanation will be made available to all persons entering the premises . . . ." Is it contemplated that a pamphlet will be provided individually to clients and prospective clients, or merely that a statement will be posted somewhere in the building (and, if the latter, where)? Is there provision for the explanation to be in languages other than English? How will the disclaimer be transmitted to persons who contact the recipient by telephone? The adequacy of signage is also related to the degree of separation of the physical offices and other indicia of separation to other people, discussed below. Once those factors are better specified, the sufficiency of the signage can be better evaluated.

Paragraph 7 (Equipment) states that the "affiliates *will* share equipment, such as telephone lines, computers, case management systems, libraries, legal research facilities, office furnishings, printers, fax machines, and web sites." (emphasis added) Although Part 1610 allows for organizations to share some equipment, such as a copier and a library, a complete sharing of *all* office property, including telephones, furniture, case management systems, etc., would be strong indicia of a lack of physical separation. Although the proposal notes that the costs of the equipment is intended

to be apportioned, that aspect speaks only to subsidization, but not to physical and financial separation. As the regulation states, "[m]ere bookkeeping separation of LSC funds from other finds is not sufficient." Without further clarification of the extent of shared physical resources, LSC must assume that all equipment is shared and the two organizations have essentially one infrastructure.

Paragraph 8 (Physical Premises) provides that the "two affiliates *may* operate in the same physical premises" (emphasis added). As the proposal does not actually describe what is anticipated in regard to physical premises, it is impossible to determine the extent of physical and financial separation. Affiliates operating on separate floors of the same building would demonstrate greater separation, while affiliates operating out of the very same offices would indicate a lack of physical separation. Alternatively, having offices on the same floor (perhaps with some shared space, such as a library), but with separate entrances for each organization might be consistent with Part 1610, depending on the totality of the circumstances. We note that if the affiliates *will* share "equipment, such as telephone lines, computers, case management systems, libraries, legal research facilities, office furnishings, printers, [and] fax machines" it seems likely that it is contemplated that the affiliates would be operating in the same premises. If this is the case, as with equipment, then it would be strong indicia of a lack of physical separation. And, again as with equipment, the fact that the costs of the space would be shared speaks only to subsidization but not to physical and financial separation (mere bookkeeping separation is not enough). As such, absent further clarification, LSC must treat this

proposal as allowing for the two entities to operate out of one physical location without any physical separation between their respective offices, which would directly violate the Part 1610 requirement that they have physical separation.

Paragraph 9 (Employee time) states that the "two affiliates *may* share legal, support and supervisory personnel (including an Executive Director, who *may* direct both programs) who *may* work part-time for each affiliate"[5] (emphasis added). As with other indicia discussed herein, although it may he consistent with Part 1610 for affiliate organizations to share *some* personnel, the proposal gives no indication of the extent of the intended overlap and explicitly contemplates that there could be 100% overlap. Like the other indicia, relative staff composition is viewed in the overall context of the relationship, but a 100% overlapping staff would likely be less indicative of true physical and financial separation than would staffs having, for example, less than 10% overlap. In addition, the proposal states in a conclusory manner that no restricted activity will be "allocated" to the recipient and that "no employee may engage in activities barred by the LSC restrictions during time paid for with LSC funding."[6] The proposal does not provide, however, any indication of how those goals would

5. To the extent that the proposal provides that personnel *may* work part-time at either program, we would note that recipients' attorneys who are full-time employees are generally barred by LSC regulations from the outside practice of law (45 CFR Part 1604).

6. LSC recipients and their employees are barred from engaging in certain activities supported with any of the recipient's funds, not just the recipient's LSC funds. *See* § 1610.4. It may be that this is meant by the proposal language, but it is not clear.

be accomplished. Absent further clarification. LSC must treat this proposal as allowing for the two entities to have a single group of employees, all of whom work part time for each entity.

Paragraph 10 (Intake) states that the "two affiliates may share a common intake and allocation mechanism to refer clients and cases between the two affiliates." Once again the proposal does not offer any details about how the intake system would work, thus rendering a reasoned analysis impossible. Depending on the system, a shared intake might make clear that it involves two separate cooperating entities or it might completely blur the distinction. The design of the intake system will also be impacted by the extent of shared staff, shared office, signage, etc.

CONCLUSION

In conclusion, then, the proposal is very broad and encompasses scenarios that would fail to provide sufficient objective integrity and independence for a grantee from an entity engaging in LSC restricted activities. Rather than a recitation that the elements of the regulation will be satisfied, LSC needs concrete information in order to determine if the regulation would, in fact, be satisfied. It may help to think of the indicia as different elements of a picture, the whole of which presents to clients and the public two separate organizations, not merely one organization with two nameplates on the door. Although there may be separate signs, business cards, and other means of identification, if the two organizations are so completely intertwined that identification of the recipient with the affiliate's restricted activities would be inevitable or that confusion would

result, the separation requirement is not met. As stated in response to the 1997 Queens situation "[w]hat amounts to little more than bookkeeping separation between the organizations is insufficient to avoid the public perception that restricted activities are being conducted by [the recipient] staff out of [the recipient] offices."

If the LSC grantees choose to establish affiliates pursuant to this proposal, we strongly recommend that they carefully consider the factors described herein as well as the other OLA External Opinions interpreting Part 1610, the attached LSC program letter, the OIG Program Integrity Audits of LSC grantees and any other materials discussing how other LSC grantees have been and are currently affiliating with other entities.[7] Moreover, we remain available to re-evaluate this proposal upon the provision of greater factual detail, especially as to physical and financial separation and/or to evaluate alternate proposals for the establishment of or relationship with affiliate organizations.

Very truly yours,

s/ Victor M. Fortuno
Victor M. Fortuno
General Counsel

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7. These materials are available from LSC upon request or via the web at <www.lsc.gov> or <www.oig.lsc.gov>. OLA External Opinions, such as this one, offer LSC's legal evaluation of the application and meaning of LSC statutes and regulations, often to situations presented by LSC grantees. OLA has a number of such opinions applying Part 1610 to situations presented by LSC grantees.

Appendix I

Attachments: April 25, 2003 Configuration Proposal
October 30, 1997 LSC Program Letter with attachments.
Certification of Program Integrity Form
Instructions for Certification of Program Integrity
Guidance in Applying the Program Integrity Standards

[Attachments intentionally omitted]

APPENDIX J — LEGAL SERVICES CORPORATION, OFFICE OF LEGAL AFFAIRS EXTERNAL OPINION EX-2003- 1009

To: Legal Services of New York City, South Brooklyn Legal Services, Farmworker Legal Services of New York, c/o The Brennan Center.

Date: June 24, 2003

Subject: Part 1610 Program Integrity Configuration Proposal

ISSUES PRESENTED

Would the arrangement set forth in the April 25, 2003, "Configuration Proposal" from the Brennan Center, as clarified by the May 23, 2003, supplemental proposal, establish sufficient Part 1610 program integrity between an LSC grantee and a proposed affiliated entity engaged in LSC restricted activities?

SUMMARY

The Configuration Proposal, as clarified, does not meet the LSC program integrity standards under 45 CFR Part 1610. As described, none of the grantees would be physically and financially separate from its respective affiliate and therefore would not meet the program integrity requirements of the regulation.

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FACTS

On April 25, 2003, the Brennan Center submitted, *inter alia*, a "Configuration Proposal" to the United States District Court for the Eastern District of New York regarding possible affiliation between certain LSC grantees and other entities engaged in LSC restricted activities. While the Proposal was not directed to LSC, it was copied to LSC's attorneys and was apparently meant as a submission for LSC's evaluation. Accordingly, the LSC Office of Legal Affairs issued External Opinion 2003-1008 (May 8, 2003) responding to the proposal. On May 9, 2003, counsel for LSC submitted a letter to the Court responding to the Brennan Center's April 25, 2003, submission to the Court, including EX-2003-1008 as an attachment and that opinion was posted to the LSC website. On May 22, 2003, the Brennan Center provided to the court a clarification of its April 23, 2003, Configuration Proposal. Again, while the clarification was not directly submitted to LSC it is apparently meant as a submission for LSC's further evaluation.

The original four-page proposal and the five-page clarification are attached and incorporated into this opinion.[1] In brief, the proposal is from LSNY, its subgrantee South Brooklyn Legal Services, and Farmworker Legal Services of New York, a former LSC grantee that apparently would

1. For the purposes of this opinion, the original proposal and the clarification shall be considered together and referred to as "the proposal." References to specific paragraphs are to the paragraphs in the original proposal, with any clarifying information from the May 22 submission treated as an amendment of, or addition to, the original paragraph.

re-apply for LSC funding if it could set up an affiliate as described therein. The proposal states that each of those three organizations "proposes to establish a legally separate Corporation . . . in accordance with the laws of the State of New York." The proposal then describes how the relationships between the LSC grantees and the non-LSC entities would be structured including many areas of overlapping staff, equipment, offices, governing bodies, etc.

ANALYSIS

Part 1610 Program Integrity Regulation

Section 1610.8(a) of the LSC regulations requires recipients to have "objective integrity and independence from any organization that engages in restricted activities." The regulation specifies three separate factors, each of which must be met, for a recipient to be determined to have objective integrity and independence from such an organization.[2] First, the organizations must be legally separate entities. 45 CFR §1610.8(a)(1). Generally, this factor is simple to satisfy if the two organizations are legally created independent corporations, although the separation must be more than a legal fiction. Second, there can be no transfer of LSC funds

2. Part 1610 it should he noted, does not affirmatively require grantees to establish or maintain separate organizations. Rather, it sets forth the parameters which grantees must abide by in their dealings with organizations that engage in restricted activities including, but not restricted to, situations in which grantees choose to use their non-LSC funds to help establish or maintain such organizations. Grantees are always free to refrain from providing funds to, or otherwise working with, such organizations.

from the recipient to the other organization and LSC funds cannot subsidize restricted activities. 45 CFR §1610.8(a)(2). For the purposes of Part 1610, a "subsidy" is

> a payment of LSC funds to support, in whole or part, a restricted activity conducted by another entity, or a payment to another entity to cover overhead, in whole or in part, relating to a restricted activity. A recipient will be considered to be subsidizing the restricted activities of another organization if it provides the use of its LSC-funded resources to the organization without receiving a "fair-market price" for such use.

62 Fed. Reg. 27695, 27698 (May 21, 1997) (preamble to final rule).

Finally, the organizations must he physically and financially separate. 45 CFR §1610.8(a)(3). Physical and financial separation is characterized by a variety of indicia, including but not limited to:

(l) the existence of separate personnel;

(2) the existence of separate accounting records:

(3) the degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and

(4) the extent to which signs and other forms of identification which distinguish the recipient from the other organization are present.

Appendix J

Physical and financial separation is the most nuanced and complex of the three factors required by the regulation. Whether physical and financial separation exists is determined on a case-by-case basis, considering the totality of the circumstances. Individual factors present in one situation might be acceptable in the context of the overall relationship between the entities, although they might be unacceptable in another situation in which other factors weigh more heavily against a finding of sufficient separation. Each factor weighs for or against separation. Some factors are heavy, some are light. It is the total weight of all the factors together that LSC looks at in determining the strength of the grantee's physical and financial separation from the other entity. However, in all situations the separation between the organizations must be clear to clients, courts, agencies and others with whom the recipient comes into contact, and to the general public.

It is also important to note that the financial separation requirement is distinct from the non-subsidization requirement. While bookkeeping can provide evidence of a lack of subsidization, the regulation explicitly states that mere bookkeeping separation is insufficient to meet the physical and financial separation requirement. Taken together the recipient and the other organization engaged in LSC restricted activities must operate as two separate entities (that may collaborate) and cannot operate as essentially one entity with administrative separation on paper. In addition to Part 1610, LSC has issued a program letter on October 30, 1997, with "Guidance in Applying the Program Integrity Standards" (attached to EX-2003-1008 and available at www.lsc.gov)

as well as numerous OLA program integrity opinions responding to questions from LSC grantees.

Actual Part 1610 compliance, as with most regulatory requirements cannot be determined in advance. Even the best laid plans to ensure program integrity are dependant on implementation. LSC's advance evaluations can only say if the described situation, independent of any other factors not mentioned, would comply with Part 1610 if implemented as described.

Proposal of April 25, 2003, as Clarified by the May 22, 2003, Supplemental Proposal

Legal Separation of Organizations

The proposal states that the respective affiliate organizations would be legally separate corporations each with its own articles of incorporation and bylaws, established in accordance with the laws of the State of New York. In addition, the proposal states that the "membership of the boards of directors of the LSC and non-LSC affiliates will be coextensive at the outset, but this may change over time" and that the boards will meet separately and keep separate records. Part 1610 permits the overlap of governing Boards between recipients and other entities engaged in restricted activities. As stated in the preamble to the final rule, "because the standards will allow control at the Board level, recipients will have an avenue through which to engage in restricted activities as long as they comply with the program integrity standards." 62 Fed. Reg. 27695, 27697 (May 21, 1997). In

this situation, it would appear that the first factor, legal separation, would be met.[3]

Transfer and Subsidization

Paragraphs 4 (Non-subsidization), 5 (Timekeeping). 7 (Equipment), 8 (Physical Premises), 9 (Time) and 10 (Intake) of the proposal implicate transfer and subsidization issues. As discussed above, Part 1610 prohibits a recipient from transferring LSC funds to an entity engaging in restricted activities or subsidizing restricted activities.[4] The proposal specifically states that there will be no transfer of LSC funds to the non-LSC entities. With respect to subsidization, a subsidy can occur if the non-LSC entity uses LSC funds or LSC-funded resources without paying the LSC grantee "fair-market value" for them. The cost-sharing goals

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3. We note, however, that while a large degree of board overlap and control is allowed, the entities must continue to be legally separate. One indication of the failure of the legally separate entity requirement would be a piercing of the corporate veil such as if an LSC grantee so thoroughly controlled another entity that the grantee would he liable for the actions of the other entity. Further evaluation might be appropriate if LSNY or the other grantees plan to use LSNY's "sole member membership corporation" model with an organization that engages in restricted activities.

4. A transfer of LSC funds from an LSC grantee to another entity would cause the other entity to be subject to LSC restrictions. 45 CFR §1610.7. The only exception to this rule is for transfers of LSC funds for private attorney involvement activities pursuant to 45 CFR Part 1614. *Id.* at § 1610.7(c).

in these specific paragraphs are consistent with the non-subsidization requirement of the regulation.[5]

Physical and Financial Separation

Paragraphs 2 (Names), 5 (Timekeeping), 6 (Signage), 7 (Equipment), 8 (Physical Premises), 9 (Time) and 10 (Intake)

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5. We caution, however, that to demonstrate compliance with Part 1610 in practice, the LSC grantee should be able to show that no LSC funded resources have, in fact, been used or are being used for restricted activities. For example, the proposed shared intake system must clearly be apportioned in a way that ensures that the LSC grantee is not providing intake services for non-grantee restricted activities. We remain concerned that the proposal confuses LSC's lobbying restriction, timekeeping and cost accounting rules with Part 1610 requirements. As we noted in EX-2003-1008. LSC's Cost Standards and Procedures regulations at 45 CFR Part 1630, while providing useful information on cost allocations standards for LSC funds, do not constitute an "approval" of any specific accounting procedures. For example, in order to assess 1610 compliance information on how the affiliate organizations will apportion value for expenses would be useful. While certain expenses can be tracked with relative ease (such as use of fax machines, phones, copiers, etc.) other expenses may be harder to apportion (such as utilities, website costs, etc.) particularly to the extent that the organizations expect to share equipment and facilities. The proposal does not discuss how it is intended that those apportionments be made; merely documenting what apportionments are, in fact, made, is not a guarantor that those apportionments are reasonable to avoid subsidization. Thus, while the requirements of' the Corporation's cost accounting, timekeeping and lobbying restriction regulations may be helpful in determining program integrity, Part 1610 may require additional documentation beyond the requirements of these LSC regulations.

of the proposal implicate physical and financial separation issues.[6] As noted above, the physical and financial separation analysis is a fact-specific, totality of the circumstances analysis that requires consideration of all of the different indicia of separation (the most important of which are identified in the regulation, as discussed above), taken together. On the basis of the information provided, the proposal does not meet the physical and financial separation standard, for many of the same reasons the 1997 Queens Legal Services situation was rejected.[7]

For the purpose of understanding which aspects of the proposal indicate a lack of physical and financial separation, the specific aspects of the proposal touching on physical and financial separation are discussed in greater detail below. The overall conclusion regarding the physical and financial separation analysis does not hinge on any single factor; rather the entire situation is considered as a whole.

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6. In EX-2003-1008 we placed the discussion of boards in the section of the Opinion on physical and financial separation. The issue of board overlap and control properly belongs in the legally separate entity section. Consequently, the discussion of Paragraph 3 of the proposal has been moved to the legally separate entity section of this Opinion.

7. On August 12, 1997, LSNY asked for LSC's Part 1610 evaluation of a proposed affiliation between its subgrantee Queens Legal Services Corporation and a non-LSC program. John Tull, Director of the LSC Office of Program Operations, informed LSNY by letter on September 10. 1997, that the proposal did not meet the requirements of Part 1610.

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Paragraph 2 (Names) provides proposed names for each of the non-LSC grantee affiliates which are intended to convey the respective affiliate's "separate legal, financial and programmatic status."

LSC Grantee	*Non-LSC Affiliate*
Legal Services for New York City	New York City Justice Center
South Brooklyn Legal Services	South Brooklyn Justice Center
Farmworker Legal Services of New York	Farmworker Justice Center

The names proposed are indicative of separate legal financial and programmatic status and are sufficiently likely to convey that status to clients, courts, agencies, the public and others with whom the grantees and the affiliates would be dealing. In particular, each grantee has a "legal services" name while the non-LSC affiliates would all be "Justice Centers." This is exemplified in the disclaimer example on page four of the May 22, 2003, clarification letter: the LSC grantee is referred to as "SBLS" while the non-LSC affiliate is referred to as the "Justice Center."

Paragraph 5 (Timekeeping). The proposal implies, but does not explicitly state, that each organization will require its own legal employees to keep detailed time records of work

performed.[8] Assuming that this is the case, this would be indicative of physical and financial separation.

Paragraph 6 (Signage), addresses signage and disclaimers the grantees and affiliates would plan to use to demonstrate the separate identities of the respective organizations. As described the signage and disclaimers would appear to indicate physical and financial separation. However, to the extent that the organizations plan to share all physical premises, equipment and staff, they would need extensive signage and other indicia of separateness to address the obvious perception that the respective organizations are not, in any but a superficial way, physically and financially separate.[9]

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8. The ambiguity in this case is due to the language of the proposal that provides that employees will maintain time records/ personnel activity reports, but does not specify which organization will be responsible for collecting the records and enforcing the recordkeeping requirements. For the purpose of this opinion we are assuming that the grantees intended to respond to our specific comment on this issue and that each organization will have and enforce recordkeeping requirements for its respective employees. If this is not the case, however, and the grantee is to base the responsibility for maintaining all time records/personnel activity reports, this would be indicative of a lack of physical and financial separation and might raise a subsidy issue as well.

9. With respect to the specific language of the disclaimer, we are somewhat concerned that the proposed sentence "Congress has refused to allow LSC funds to be used to finance the work of the Justice Center" is potentially confusing because it focuses on Congress' directive rather than how that directive is implemented by the grantee. Congress has no direct involvement with the proposed

(Cont'd)

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Paragraph 7 (Equipment) states that the "affiliates will share equipment, such as telephone lines, computers, case management systems, libraries, legal research facilities, office furnishings, printers, fax machines, and web sites." As described, each grantee would essentially share one infrastructure with a non-LSC affiliate. This clearly indicates a lack of physical and financial separation. Although Part

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(Cont'd)

Justice Center. Rather, the disclaimer must make clear that the LSC recipient is not associated with any restricted activities. To the extent that the proposal is looking to the disclaimer language used by other grantees (footnote nine on page four of the May 22 clarification references the disclaimer on the Lane County Legal Services website), we would suggest that the Lane County website contains an even clearer statement of distinction as indicated here:

> Lane County Legal Aid Service and Lane County Law and Advocacy Center are separate, independent non-profit corporations.
>
> Senior Law Service is part of Lane County Law and Advocacy Center.
>
> Lane County Legal Aid Service is funded by the Legal Services Corporation. Use of these funds is restricted. **Legal Aid does not engage in nor provide support for any restricted activities.**
>
> Legal Aid and the Advocacy Center cooperate to serve the legal needs of low-income persons in Lane County.

http:/www.lanecountylegalservices.org/ (June 12, 2003) (emphasis added). Statements along these lines would be preferable to the formulation contained in the proposal.

1610 allows for organizations to share some equipment, such as a copier and a library, a complete sharing of *all* office property, including telephones, furniture, case management systems, etc., would be a heavy indicia of a lack of physical separation. Although the proposal notes that the costs of the equipment is intended to be apportioned, that aspect speaks only to subsidization, but not to physical and financial separation. As the regulation states, "[m]ere bookkeeping separation of LSC funds from other funds is not sufficient."

Paragraph 8 (Physical Premises) proposes that each grantee and its affiliate would operate in one physical location with no physical separation beyond that degree of physical separation required of other non-profit federal grantees by Presidential Executive Order No. 13279." However, Executive Order No. 13279 does not apply to the Legal Services Corporation, nor its grantees. The E.O. expressly applies to "agencies that administer social service programs supported with Federal financial assistance." Section 2. For the purpose of the E.O., "agency" is defined as "a department of agency in the executive branch." Section 1 (d). Under the Corporation's organic legislation, LSC "shall not be considered a department, agency, or instrumentality of the Federal Government." 42 U.S.C. §2996d. Furthermore, the LSC program is not a "social service program" covered by the E.O. *See* Section 1(b) for a list of programs included within the ambit of the E.O.

Rather, LSC is bound to apply, and grantees are bound to comply with, the physical and financial separation standards of Part 1610. As with the situation of equipment, the proposal describes each grantee and its affiliate as having

essentially one infrastructure. The fact that the costs of the space would be shared speaks only to subsidization but not to physical and financial separation (mere bookkeeping separation is not enough). Allowing for the two entities to operate entirely out of one physical location without any physical separation between their respective offices would directly violate the Part 1610 requirement that they have physical and financial separation.

Paragraph 9 (Employee time) states that the two affiliates "propose to share all legal support and supervisory personnel (including an Executive Director, who will direct both programs)." As with other indicia discussed herein, relative staff composition is viewed in the overall context of the relationship. Although it may be consistent with Part 1610 for affiliate organizations to share *some* personnel, a 100% overlapping staff weighs heavily against true physical and financial separation. As described in the October 30, 1997 Program Letter:

> There is no *per* se bar against a recipient employing part-time staff who are also employed part-time by an organization which engages in restricted activity. Generally speaking, however, the more staff 'shared,' or the greater the responsibilities of the staff' who are employed by both organizations the more danger that program integrity will be compromised. Sharing an executive director, for example, inappropriately tends to blur the organizational lines between the entities. Likewise, sharing a substantial number of recipient staff calls the recipients separateness into question.

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"Program Integrity Guidance" at 3, attachment to October 30, 1997, LSC Program Letter "Certification of Program Integrity" attached to EX-2003-1008 and available at www.lsc.gov. In order to best demonstrate separation, the two organizations could clearly track and allocate the time and activities of all staff and volunteers.

The pledge that "no personnel will engage in LSC-funded activities while working in the capacity as an employee of a non-LSC grantee affiliate" does not ameliorate the problem that by having completely overlapping staffs, each grantee and its affiliate appear to be essentially one organization. In the same way that apportioning costs for overhead and equipment speaks only to the issue of subsidization and not to physical and financial separation, the fact that employees "on the clock" for the grantee would not be doing any work for the affiliate, and vice versa, serves only to prevent potential subsidization and is not sufficient to demonstrate physical and financial separation of the organizations.

Paragraph 10 (Intake) states that "the respective affiliates propose to share a common intake and allocation mechanism to refer clients and cases between the affiliates." As the point of entry for clients, a shared intake mechanism must clearly differentiate between the two entities. The only description of how the intake system will work is a statement that the disclaimers described in the proposal will be provided to applicants for service and clients. By itself this does very little to give the clients a clear experience of being directed to one of two separate organizations rather than merely being routed within one entity. Considering the extensive degree of integration otherwise being proposed between the

organizations, the shared intake system, absent more detailed procedures to distinguish the two affiliates, would only serve to reinforce the experience of the affiliates as essentially one entity with administrative separation on paper.

CONCLUSION

As noted above, there are three separate factors which must each be met in order for a grantee to have "objective integrity and independence from any organization that engages in restricted activities." As described, the proposal appears to meet the first two factors concerning legal separation of the entities and avoidance of any transfer of LSC funds or subsidization of restricted activities. However, the proposal fails to meet the final factor - physical and financial separation. Although certain elements of the proposal indicate such separation, other critical elements, in particular the proposed 100% sharing of physical space, equipment, and staffs, demonstrate that the proposal as a whole fails to provide physical and financial separation. On balance, the proposal presents a scenario in which although there may be separate signs, business cards, and other means of identification, the affiliated organizations would be so completely intertwined that they would in fact operate as one. The separation requirement clearly is not met. As such, notwithstanding the proposed signage, disclaimers, etc., identification of the recipient with the affiliate's restricted activities would be inevitable. As stated in response to the 1997 Queens situation "[w]hat amounts to little more than bookkeeping separation between the organizations is insufficient to avoid the public perception that restricted activities are being conducted by [the recipient] staff out of

[the recipient] offices." Part 1610 requires that an LSC grantee "maintain objective integrity and independence from any organization that engages in restricted activities." While the amended proposal could meet the requirements of legally separate entities, no transfer of LSC funds, and no subsidization of restricted activities with LSC funds, it fails to provide for sufficient physical and financial separation between the two organizations.

Very truly yours,

s/ Victor M. Fortuno
Victor M. Fortuno
General Counsel

Attachments: April 25, 2003 Configuration Proposal
May 22, 2003 Clarification

[Attachments intentionally omitted]

APPENDIX K — LETTER FROM ANNE NACINOVICH OF KRONISH, LIEB, *et al.* TO HONORABLE FREDERIC BLOCK, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK DATED JULY 6, 2004

KRONISH LIEB
WEINER & HELLMAN LLP

Direct Dial: (212) 479-6632
E-mail: anacinovich@kronishlieb.com

July 6, 2004

BY HAND DELIVERY AND FACSIMILE

Honorable Frederic Block
United States District Judge
United States District Court for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Velazquez v. Legal Services Corporation, 97 CV 00182 (FB); Dobbins v. Legal Services Corporation, 01 CV 8371 (FB)

Dear Judge Block:

Both parties in the above-captioned matter respectfully submit the enclosed Stipulated Facts relating to the preliminary injunction application of *Dobbins* plaintiffs Legal Services for New York City and South Brooklyn Legal

Services, and *Velazquez* plaintiff Farmworker Legal Services of New York. Both parties anticipate making separate letter brief submissions to the Court within a few days.

We understand that the government does not object.

Respectfully submitted,
s/ Anne Nacinovich
Anne Nacinovich

cc: Laura Abel, Esq. (by facsimile and mail)
David Udell, Esq. (same)
Craig Siegal, Esq. (same)
John Tyler, Esq. (same)

PARTIES' STIPULATED FACTS

July 6, 2004

In response to that portion of the Court's Order of May 12, 2004 inquiring whether the parties wish to stipulate to facts with respect to the preliminary injunction application of *Dobbins* plaintiffs Legal Services for New York City ("LSNY") and South Brooklyn Legal Services ("SBLS"), and *Velazquez* plaintiff Farmworker Legal Services of New York ("FWLS") (collectively, the "program plaintiffs"), the parties stipulate to the following facts without conceding relevance or materiality, which are addressed in the parties' other submissions to the Court. The parties also reserve their rights to cite to the record, although only the facts set forth herein are stipulated.

Appendix K

The Program Integrity Regulation

1. In 2000, LSC grantees throughout the nation accepted approximately $600 million in LSC and non-LSC funding.

2. In 2000, approximately half of the LSC grantee funding came through directed grants from LSC, and the other half came from sources other than LSC.

3. Pursuant to a series of riders enacted by Congress in connection with the annual appropriation for the Legal Services Corporation ("LSC"), which were largely implemented through LSC regulations codified at 45 C.F.R. § 1600 *et seq.*, all LSC grantees are required, as a condition of receiving funding, to agree not to engage in many types of legislative and administrative advocacy, not to seek and claim attorneys' fee awards, not to participate in class action litigation, not to represent certain immigrants, not to represent clients when that representation results from in-person unsolicited advice, and not to engage in certain other activities (collectively "restricted activities").

4. According to the Congressional riders, "None of the funds appropriated [by Congress for the LSC] may be used to provide financial assistance to any [recipient]" that engages in any of the prohibited activities. Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321. LSC grantees cannot engage in restricted activities whether they are funded by federal funds or by funds from other sources, except through an affiliation with a non-grantee legal services provider, either by creating such an affiliate or forming a relationship with

an existing unrestricted legal service provider, under the conditions set forth in LSC's regulation entitled "Program integrity of recipient," which is codified at 45 C.F.R. § 1610.8.

5. LSC has issued a document entitled "LSC, Guidance in Applying the Program Integrity Standards," which is in the record at Exhibit 34 of the Declaration of Laura K. Abel dated December 14, 2001, and is incorporated in these stipulated facts by reference. That document states, among other things, that regarding shared personnel, "There is no per se bar against a recipient employing part-time staff who are also employed part-time by an organization which engages in restricted activity. Generally speaking, however, the more staff 'shared,' or the greater the responsibilities of the staff who are employed by both organizations, the more danger that program integrity will be compromised. Sharing an executive director, for example, inappropriately tends to blur the organizational lines between the entities. Likewise, sharing a substantial number or proportion of recipient staff calls the recipient's separateness into question. . . . For larger organizations, 10% of the recipient's attorney/paralegal staff should serve as a guide. However, for recipients with smaller staffs, the program director should use his or her best judgment to determine whether part-time staff constitute a substantial proportion of the recipient's legal workforce."

6. LSC's stated intent in promulgating the program integrity regulation is set forth at 62 Fed. Reg. 27695 (1997).

7. LSC evaluates compliance with the program integrity regulation through a case-by-case analysis of the relationship between a grantee and non-grantee affiliate.

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8. Upon request, LSC will provide guidance to grantees who want to determine whether a particular affiliation proposal is likely to satisfy the program integrity regulation. If LSC believes the proposal satisfies the program integrity regulation, LSC will notify the grantee of its belief but will not — and believes, as a practical matter, that it cannot — state whether a proposal that provided for a greater degree of sharing would also have satisfied the regulation. If, on the other hand, LSC believes the proposal does not satisfy the regulation, it will notify the grantee and explain its reasoning, but it will not — and believes, as a practical matter, that it cannot — specify the minimum amount and kind of changes necessary for the proposal to comply with the regulation.

9. LSC does not maintain a list of all LSC-grantee affiliation relationships.

10. LSC is not aware of how many successful affiliate relationships currently exist or the precise characteristics of those relationships.

11. As of May 2002, LSC was aware of at least seven LSC grantees that had entered or proposed entering into relationships with non-LSC legal services organizations to which LSC did not object. Additional relationships may have been created since that time.

12. These seven affiliate relationships had the following characteristics:

Affiliates	Overlapping Board of Directors	Shared Physical Space	Shared Staff	Other
LSC grantee Alaska Legal Services Corp. Proposal	Full overlap		One shared support staff position	Cross referrals
LSC grantee Pine Tree Legal Assistance and non-grantee Maine Equal Justice Partners			two shared part-time attorneys or two Pine Tree attorneys may take a year-long leave to work with MEJP	
LSC grantee Piedmont Legal Services and non-grantee Charlottesville-Albermarle Legal Aid Society	Full overlap			The unrestricted CALAS provided accounting services for PLS for a year[1] pursuant to a contract under which PLS paid for the service

1. This accounting contract covered 1998-1999. As of May, 2002 these two organizations no longer existed.

	Affiliates	Overlapping Board of Directors	Shared Physical Space	Shared Staff	Other
	LSC grantee Potomac Legal Aid and non-grantee Legal Services of Northern Virginia		PLA sublets its space from LSNV.		
	LSC grantee Legal Advice &				

Affiliates	Overlapping Board of Directors	Shared Physical Space	Shared Staff	Other
Resource Center, and non-grantee New Hampshire Legal Assistance	Partial overlap			
LSC grantee Central Virginia Legal Aid Society, Inc. and non-grantee Legal Aid Justice Center		CVLAS sublet space from LAJC.	one shared part-time attorney	Shared intake
LSC grantee Atlanta Legal Aid Society, Inc. and non-grantee Southern Center for Human Rights				LSC grantee gave non-LSC funds to the unrestricted entity. The funds were earmarked for restricted prisoner representation cases.

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The Program Plaintiffs

13. Each of the program plaintiffs desires to engage in some or all of the restricted activities.

14. As a result of severe resource constraints, the program plaintiffs and the programs to which LSNY allocates funds are able to serve only a small proportion of the low income New Yorkers eligible for their services and in need of civil legal assistance.

15. The program plaintiffs and the programs to which LSNY allocates funds attempt to spend their funds and organize their programs economically in order to direct their resources towards client services.

16. Over the course of the past few years, LSC has merged many of its service areas into larger and less numerous ones. As a result, LSC grantees which serve one or more service areas are now mostly larger regional or statewide programs. For example, from 2003 to 2004 New York State went from 15 services areas to 7.

LSNY Facts

17. LSNY provides legal services to indigent civil clients in New York City.

18. LSNY receives an annual grant from LSC and allocates it to its units and associated New York City legal services groups: SBLS; Bedford-Stuyvesant Community Legal Services; Brooklyn Legal Services, Corporation A;

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Harlem legal Services; LSNY Bronx; LSNY Brooklyn Branch; LSNY Legal Support Unit; LSNY Manhattan; LSNY Staten Island; Legal Services for the Elderly; and Queens Legal Services.

19. In 2001, LSNY's total budget was approximately $32,000,000.

20. Approximately $12,000,000 (38%) of the 2001 budget came from LSC.

21. Prior to the enactment of the LSC restrictions, LSNY attorneys litigated many class action lawsuits and engaged in some or all of the other restricted activities.

22. On August 12, 1997, LSNY submitted an affiliation proposal to LSC on behalf of Queens Legal Services ("QLSC") to create an unrestricted affiliate "QLSC-II."

23. LSNY's QLSC proposal is in the record at Exhibit 28 to the Declaration of Laura K. Abel dated December 14, 2001. That document is incorporated in these stipulated facts by reference.

24. LSC's response to LSNY's QLSC proposal is in the record at Exhibit 27 to the Declaration of Laura K. Abel dated December 14, 2001. That document is incorporated in these stipulated facts by reference.

25. QLSC has determined that an affiliation configuration whereby it created an affiliate which operated in a physically separate locality, and did not share any

equipment or any staff, would cost the organization at least $200,000 per year. The expenses would include separate office space, a separate executive director and other staff salaries and benefits; and the recurring expenses necessary to maintain separate computers, copiers, furniture and other equipment; separate phone systems; and separate fundraising materials.

26. In 2003, the program plaintiffs, including LSNY, submitted a more detailed proposal to LSC. That proposal is contained in the plaintiffs' Configuration Proposal submitted to the Court on April 25, 2003 and in the plaintiffs' Clarification submitted to the Court on May 22, 2003. Both documents are incorporated in these stipulated facts by reference.

27. LSC's response to the plaintiffs' Configuration Proposal and Clarification is contained in LSC External Opinion # EX-2003-1008 (May 8, 2003), attached to LSC Letter to the Court dated May 8, 2003, and also in LSC External Opinion # EX 2003-1009 (June 24, 2003), attached to the LSC Letter to the Court dated June 24, 2003. Both documents are incorporated in these stipulated facts by reference.

28. After the enactment of the LSC restrictions, LSNY considered whether it could feasibly affiliate with another organization in order to meet the program integrity requirements.

29. LSNY and the programs to which it allocates funds have not established affiliate relationships pursuant to the

program integrity regulation whereby they would have formal control of the affiliate at the board level.

30. LSNY and the programs to which it allocates funds have not affiliated with an already existing unrestricted legal services provider whereby they would have formal control of the affiliate at the board level.

31. Apart from the QLSC proposal and the more detailed proposal described above in paragraph 26, LSNY and the programs to which it allocates funds have not submitted a proposal to LSC about creating an unrestricted affiliate or affiliating with an existing unrestricted legal services provider whereby they would have formal control of the affiliate at the board level.

SBLS Facts

32. SBLS is a not-for-profit legal advocacy organization founded in 1968.

33. SBLS provides legal assistance and representation to indigent civil clients in Brooklyn.

34. Prior to 1996, SBLS engaged in some or all of the restricted activities described in paragraph 3 above.

35. Since the filing of the Dobbins complaint, SBLS has been allocated LSC funds by LSNY.

36. In 2000, SBLS had a budget of $4,301,372; LSC funds accounted for approximately 33% of that budget and

the remaining 67% of the budget derived from private and non-LSC government donors.

37. SBLS currently has one intake mechanism.

38. SBLS currently has one board of directors.

39. As of June 2004, SBLS had 34 lawyers.

40. After the enactment of the restrictions and the promulgation of the program integrity regulation, the SBLS Board of Directors considered the possibility of establishing affiliate relationships whereby SBLS would have formal control of the affiliate at the board level.

41. At some point in time prior to June 2002, SBLS determined that an affiliation configuration whereby it would create an affiliate which operated in a physically separate locality, did not share any equipment and shared only one attorney, would cost the organization at least $380,000, which is 8% of the budget. The expenses would cover additional staff, equipment and rent, and SBLS estimates that by creating an affiliate, SBLS and the unrestricted affiliate would serve approximately 500 fewer clients than SBLS serves now, and that overall, SBLS and the unrestricted affiliate would have fewer staff available to serve clients than SBLS now has.

42. SBLS has not established an affiliated program under the program integrity regulations whereby SBLS would have formal control of the affiliate at the board level.

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43. SBLS has not affiliated with an already existing unrestricted legal services provider whereby SBLS would have formal control of the affiliate at the board level.

44. Apart from the Configuration Proposal and Clarification described above in paragraph 26, SBLS has not submitted a proposal to LSC about creating an unrestricted affiliate or affiliating with an existing unrestricted legal services provider whereby SBLS would have formal control of the affiliate at the board level.

45. SBLS is sometimes unable to refer cases with the potential for attorneys' fee awards to other legal services organizations or the private bar. Additionally, SBLS is not always able to anticipate at the inception of a case whether it is possible to seek a fee award.

46. Consequently, since Congress enacted the restriction preventing LSC grantees from seeking or claiming attorneys' fee awards, *see* 45 C.F.R. § 1642.3, SBLS has continued to handle some cases in which fee awards are available, rather than referring all of them to non-LSC grantees. In those cases, SBLS neither seeks nor claims a fee award.

47. SBLS estimates that were it not subject to the restriction on attorney's fee awards, it would collect approximately $200,000 - $300,000 each year for its work on those cases.

48. SBLS estimates that it could serve 250-400 clients each year with $200,000 - $300,000.

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49. Prior to the enactment of the restrictions, SBLS attorneys litigated many class action lawsuits.

50. After the enactment of the restrictions, SBLS was unable to find an attorney to take on a particular class action case involving welfare recipients and child care providers who are entitled to money from the City of New York. SBLS originally asserted one set of claims on behalf of an individual plaintiff. SBLS and the City reached a settlement in which the individual plaintiff represented by SBLS obtained both prospective and retrospective relief for herself, including a payment of $12,000, and the City agreed to change its policy generally going forward. However, SBLS has been unable to file a class action lawsuit, and to seek an attorneys' fee award, in order to obtain retrospective relief for other potential plaintiffs, including certain LSC-ineligible immigrants. Nor has SBLS been able to find an attorney to file the proposed lawsuit, despite attempts to do so.

51. The New York Foundation ("NYF") is aware of LSC's restrictions, and gave money to SBLS knowing it was subject to the restrictions. NYF would nevertheless prefer that its donations be used for restricted activities, including filing the lawsuit described in paragraph 50 above.

52. NYF chooses to provide funds to SBLS rather than to any other organization, despite the imposition of the LSC restrictions on those funds, because it believes that: i) SBLS uses the funds to support important services for a severely disadvantaged client population; ii) SBLS' staff possess tremendous ability and relevant expertise, and iii) SBLS maintains a close relationship to the population it serves.

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FWLS Facts

53. FWLS is a not-for-profit legal advocacy organization that represents indigent clients, specifically migrant and seasonal farm workers.

54. FWLS engages in litigation on behalf of its clients, as well as legislative and administrative advocacy.

55. FWLS represents many non-citizen clients.

56. FWLS serves clients throughout New York State's rural areas.

57. The organization's work involves reaching out to workers in isolated rural labor camps, educating them about their legal rights and offering to represent them.

58. FWLS attorneys frequently travel long distances.

59. FWLS clients often do not have access to telephones.

60. FWLS clients often do not have access to public transportation.

61. Prior to the enactment of the restrictions, FWLS received approximately half of its annual funding from LSC.

62. After the restrictions were enacted, FWLS considered whether it could feasibly create an affiliate relationship and comply with the program integrity regulation.

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63. At some point in time, FWLS determined that if it created a dual office structure, with separate executive directors, separate staff, separate furniture, separate equipment, separate computers, and other separate administrative requirements, it would cost the organization at least $130,000 in the first year and $80,000 annually thereafter.

64. This affiliate configuration FWLS considered creating would have allowed FWLS to share a copier, a fax machine, a reception area, and a common secretary in the Rochester office, and to share a paralegal, an attorney, and perhaps a reception area and secretary in the New Paltz office.

65. If FWLS could not share the items described above, and had to pay for their duplication, it would incur costs in addition to those described above.

66. In 1997, FWLS applied for LSC funding for 1998. FWLS's executive director subsequently called LSC, and asked whether the program integrity regulation would be satisfied if FWLS established an independent not-for-profit corporation to take over FWLS' restricted activities, to operate exclusively with non-LSC funds, and to share all staff, all equipment and all physical premises with FWLS, if the programs ensured that LSC funds would not be spent on restricted activities and if the programs kept separate financial records, time records, and activity reports. He was told that this probably would not satisfy the program integrity requirement. FWLS consequently withdrew the funding request. FWLS did not submit a written affiliation proposal until it submitted the configuration proposal described in

paragraph 26 above. FWLS has not established an affiliated program under the program integrity regulations whereby FWLS would have formal control of the affiliate at the board level.

67. FWLS has not affiliated with an already existing unrestricted legal services provider whereby FWLS would have formal control of the affiliate at the board level.

68. Apart from the situation described above at paragraph 66, and the Configuration Proposal and Clarification described above at paragraph 26, FWLS has not submitted a proposal to LSC about creating an unrestricted affiliate or affiliating with an existing unrestricted legal services provider whereby FWLS would have formal control of the affiliate at the board level.

69. Were LSC grantees permitted to engage in restricted activities through the affiliation configuration plaintiffs proposed on April 25, 2003, as supplemented by plaintiffs clarification of May 22, 2003, FWLS would apply for LSC funding again by directly applying to LSC, and if it did not receive funding directly from LSC it would seek a sub-grant of LSC funds from a LSC grantee.

70. Prior to 1996 FWLS and one other program were the only freestanding farmworker legal services programs to receive LSC funding.

71. FWLS, which had received funding from LSC for almost twenty years, rejected LSC funding for the first time in July, 1996 because of the newly imposed congressional

restrictions, and it withdrew its 1998 LSC funding application because of the newly promulgated program integrity regulation.

72. In doing so, it declined approximately $106,000 in federal funding for the second half of 1996.

73. In 1996, with federal funding, FWLS's annual budget had been approximately $582,000.

74. After declining LSC funding in 1996, FWLS has reduced its personnel by eliminating two attorney positions and all four of its support staff positions.

75. FWLS's workload has remained relatively constant since 1997. It currently has one office and eight employees. Were LSC grantees permitted to engage in restricted activities through the affiliation configuration plaintiffs proposed on April 25, 2003, as supplemented by plaintiffs clarification of May 22, 2003, and were FWLS to receive LSC funding again, it would open two additional offices in order to better serve its statewide clientele.

76. FWLS is sometimes unable to refer cases with the potential for attorneys' fee awards to other legal services organizations or the private bar. Additionally, FWLS is not always able to anticipate at the inception of a case whether it is possible to seek a fee award.

77. Consequently, if FWLS were to become an LSC grantee or sub-grantee and become subject to the restriction on seeking or claiming attorneys' fee awards in 45 C.F.R.

§ 1642.3, it would continue to handle some cases in which fee awards were available, and would refrain from seeking or claiming a fee award in those cases.

78. Attorney's fee awards for FWLS's current caseload are $40,000 - $50,000 each

79. FWLS receives funding from New York State's Interest on Lawyer Accounts program specifically to engage in some of the activities that would be barred by the LSC restrictions if FWLS were to accept LSC funding. FWLS 's current IOLA grant is $151,520.

Dated: New York, New York
July 6, 2004

Respectfully Submitted,

KRONISH LIEB WEINER
& HELLMAN LLP

By: Stepen L. Ascher
Stephen L. Ascher (SA-7820)

1114 Avenue of the Americas
New York, New York 10036
(212) 479-6000

Counsel for Defendant
Legal Services Corporation

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BRENNAN CENTER FOR JUSTICE

By: Laura K. Abel
Laura K. Abel (LA 6831)

161 Avenue of the Americas,
12th floor
New York, New York 10013
(212) 998-6730

Counsel for Plaintiffs Legal Services for New York City, South Brooklyn Legal Services, and Farmworkers Legal Services of New York

APPENDIX L— DECLARATION OF ANDREW SCHERER DATED DECEMBER 7, 2001

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

97 Civ. 00182 (FB)

CARMEN VELAZQUEZ, *et al.*,

Plaintiffs,

-against-

LEGAL SERVICES CORPORATION, *et al.*,

Defendants.

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01 Civ. (FB)

DAVID F. DOBBINS, *et al.*,

Plaintiffs,

-against-

LEGAL SERVICES CORPORATION,

Defendant.

DECLARATION OF ANDREW SCHERER

I, Andrew Scherer, hereby declare as follows:

1. I am the Executive Director and President of Legal Services for New York City ("LSNY"), having accepted appointment by LSNY's Board of Directors to this position

on October 9, 2001. I was Acting Executive Director of LSNY from February, 2001 to October 9, 2001, and previously held the position of LSNY Deputy Director. Earlier, I served as an attorney within LSNY, having begun work as a legal services lawyer at Bronx Legal Services, Inc. in 1978. I am an attorney in good standing admitted to the bar of the State of New York. I am a 1978 graduate of New York University School of Law.

2. LSNY, formerly known as Community Action for Legal Services (CALS), was initially formed in September 1967 as a confederation of community-based legal services programs, many of them created and operating well before the passage of the Legal Services Corporation Act in 1974. CALS, later LSNY, has received funding for legal services from a variety of sources, including from the Office of Economic Opportunity in the U.S. Department of Health, Education and Welfare, the Legal Services Corporation, New York State, New York City, the New York Interest on Lawyers Accounts fund, and additional public and private sources.

3. LSNY, as one of the largest civil legal services organizations in the United States, has been providing high quality free legal assistance to low-income people throughout New York City for over thirty years. LSNY provides its services through a network of community based legal services organizations located in low-income communities and transportation hubs in four of New York City's five boroughs. The LSNY system includes the following community-based legal services programs operating as not-for-profits organized under the laws of the State of New York: Bedford-Stuyvesant Community Legal Services; Bronx Legal Services; Brooklyn

Legal Services Corporation A; Brooklyn Legal Services Corporation B ("South Brooklyn Legal Services"); Harlem Legal Services; MFY Legal Services ("MFY"); and Queens Legal Services (together, the "subgrantees"). LSNY also includes LSNY Brooklyn, Legal Services for the Elderly and the LSNY Legal Support Unit.

4. LSNY programs offer civil legal assistance in the core practice areas of family, housing, benefits, consumer, and education law, and in other areas too. LSNY programs represent clients in courts and administrative tribunals, provide advice and referral information, assist clients with community-based economic development and legal education, collaborate with pro bono volunteers, and provide professional training in poverty law. LSNY programs also operate special projects for the elderly, for people with physical and mental disabilities, for victims of domestic violence, for immigrants, and for people with HIV. LSNY programs and outreach centers, located in low-income neighborhoods and transportation hubs throughout New York City, are a vibrant, significant and integral part of a legal services delivery system in New York that also includes various other civil legal services providers.

5. LSNY receives the annual LSC grant for legal services provision in New York City and subgrants the LSC funds to local programs that are organized as not-for-profits incorporated under the laws of the State of New York, including plaintiffs Bronx Legal Services, MFY and South Brooklyn Legal Services.

Appendix L

6. LSNY and its programs handle approximately 25,000 cases per year on behalf of approximately 75,000 people. In providing this service in 2001, LSNY's budget involved the receipt and expenditure of a total of approximately $32 million from a variety of sources.

7. In 2001, LSNY's anticipated revenues (including those revenues available to all programs and units that receive subgrants of LSC funds from LSNY) included the following:

a. Legal Services Corporation funds, in the approximate amount of $12 million, comprising 38.0% of LSNY's budget;

b. Other federal (non-LSC) funds, in the approximate amount of $1.1 million, comprising 3.3% of LSNY's budget;

c. New York State funds, in the approximate amount of $5.1 million comprising 16.0% of LSNY's budget;

d. New York City funds, in the approximate amount of $6.3 million, comprising 19.7% of LSNY's budget;

e. New York Interest on Lawyers Account (IOLA) funds, in the approximate amount of $2.3 million, comprising 7.2% of LSNY's budget;

f. Private funds, in the approximate amount of $4.9 million, comprising 15.5% of LSNY's budget.

Appendix L

8. The federal appropriations restrictions imposed by the Congress in 1996 and subsequent years on LSC grantees (hereinafter, the LSC restrictions) significantly interfere with the efforts of the staff of LSNY, and of its units and subgrantees, to provide high quality legal assistance to low income clients. For example, these restrictions prohibit lawyers in LSNY programs from participating in class actions, claiming attorneys fee awards, initiating representation of potential clients, engaging in lobbying, engaging in rulemaking, representing clients without regard to immigration status, and representing clients who are temporarily incarcerated. The restrictions impede lawyers in LSNY programs as they work to represent clients and potential clients.

9. During the years prior to 1996, and prior to the imposition of the federal appropriations restrictions, lawyers affiliated with LSNY programs participated in class actions, sought attorneys fees, conducted lobbying, represented clients regardless of alienage status, engaged in outreach to potential clients, and represented persons even if temporarily incarcerated.

10. In many instances, claims presented by LSNY clients did not necessitate that the lawyers engage in activities prohibited by these restrictions. However, LSNY programs always sought, pursuant to the Legal Services Corporation Act, to provide high quality legal representation pursuant to governing professional standards, and in appropriate instances found it necessary and important, prior to 1996, to assist clients with the forms of advocacy that are now restricted.

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11. For example, lawyers affiliated with LSNY programs participated in important class action lawsuits aimed at enforcing basic legal rights for low income clients, including challenges to illegal practices of the federal Social Security Administration, the New York City Human Resources Administration, the New York City Housing Authority, the New York City Public school system, the New York City Administration for Childrens Services, and a variety of unscrupulous landlords, lenders, developers and other entities and individuals. LSNY affiliated lawyers routinely and effectively claimed and obtained attorneys fees awards on behalf of their clients. Attorneys fees in claims against public agencies, landlords and other antagonists played a significant role in deterring lawless behavior by such antagonists.

12. The extension of the LSC restrictions to the non-federal funds possessed by LSC grantees (the so called "non-federal funds restriction") further hinders the efforts of lawyers in LSC grantee programs to serve their clients. As noted above, LSNY programs annually receive and spend almost $19 million in non-federal funds, a figure comprising (on an aggregate basis, across all of LSNY's programs) approximately 60% of LSNY's budget. None of these funds may be used for activities prohibited under the LSC restrictions, even if the funder wishes that they be used precisely for such activities, even if the aims of the LSNY program itself require that the funds be used for such activities, and even if the consequence of the restrictions is to prevent individuals from securing their civil legal rights.

13. LSC's promulgation of a "program integrity regulation," 45 C.F.R. §1610.8, does not afford LSNY or its

programs an adequate opportunity to spend non-federal funds on activities prohibited under the LSC restrictions. The program integrity regulation's requirement of physical and objective separation imposes an array of programmatic, administrative, and financial costs that constitute an undue burden on the efforts of LSNY and its subsidiary programs in seeking to use non-federal funds to advance program goals and to secure clients' rights. To date, no LSNY program has been able to establish an affiliate entity pursuant to 45 C.F.R. §1610.8.

14. As part of LSNY's recent consideration of a "Strategic Restructuring Plan," LSNY conducted an extensive internal and external dialogue lasting several months regarding the optimal structure for LSNY. As part of this dialogue, the participants discussed the subject of whether LSNY could responsibly allocate funds to finance the creation of an affiliate program pursuant to LSC's program integrity regulation. Over the course of a series of conversations, the participants were unable to come up with a feasible way to create a useful separate entity in compliance with LSC's program integrity regulation. In these conversations, participants noted that isolating out a city-wide unrestricted office, affiliated with LSNY under §1610, would replicate the inherently problematic relationships that already exist with other legal services provider organizations in New York City that are wholly unaffiliated with LSNY. The participants determined that the most effective and efficient way to provide for the needed services in New York City — the services prohibited under the LSC restrictions — would be to have some attorneys in each office designated and available to do the unrestricted work. Nor did any of the subgrantees

see it as responsible to establish their own affiliates under 45 C.F.R. §1610.8, again because of the mix of programmatic, administrative and financial burdens imposed by the regulation's requirement of physical and objective separation. LSNY believes that §1610 forces programs to establish wasteful and cumbersome structures that do not advance clients' interests.

Programmatic Burdens

15. The program integrity regulation's requirement of physical and objective separation directly conflicts with LSNY's goal of providing clients with high quality and effective community-based representation. The regulation requires programs like LSNY and its subgrantees to establish and sustain physically separate offices if they seek to engage in any activities subject to the restrictions. However, as set forth below, separating lawyers who receive some LSC funding (those handling primarily direct services practices because their activities are limited under the LSC restrictions) from lawyers in non-LSC funded programs (those able to engage in various categories of restricted activities in physically separate offices with financing from non-LSC funds) effectively weakens each group of lawyers. Physical and objective separation of the two classes of lawyers presents genuine obstacles to effective client representation.

16. Lawyers in the unrestricted programs who are allowed to handle matters free from the LSC restrictions are unable to be effective if they are isolated from the range of issues affecting members of low income communities that emerge through direct service practice in community-based

legal services programs. Lawyers are most effective in conducting class actions or engaging in lobbying when they are directly engaged with client communities. For lawyers to be most effective in conducting class actions, they must be exposed to the range of issues that surface through high volume direct service practice. Specifically, lawyers handling class actions are better able to handle discovery and to develop facts in support of their clients' claims if they are also knowledgeable about how the challenged laws affect their clients' lives and their clients' individual claims. A lawyer is better able to inform class members about opportunities for input, and better able to process such input, if the lawyer understands the clients' legal needs, the barriers the clients face, concerns of the clients' communities, and the clients' language. Similarly, a lawyer advancing a lobbying effort is most effective in marshaling the supporting facts if the lawyer understands and is knowledgeable about the effects of the law on clients' lives. Because 45 C.F.R. §1610.8 isolates lawyers in the unrestricted program from the communities they wish to serve, it interferes with effective representation of clients.

17. Conversely, lawyers in LSC-restricted programs that receive some LSC funding are less able to effectively represent their clients if they are segregated from the lawyers who are handling class wide claims on behalf of their clients. The capacity to spot issues in need of litigation, to learn about class wide claims and class wide relief, and to integrate clients claims into larger suits or lobbying efforts confronting systemic problems, is effectively impaired when advocates are impeded in their efforts to associate with lawyers bringing class actions or lobbying.

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18. LSNY believes that any client who enters a LSNY program office ought to be able to obtain the legal assistance necessary to secure that client's legal rights to address the range of civil legal problems that confront low income individuals and families. In some instances, this may involve basic legal advice or assistance. In others, it may entail class action representation, lobbying, or other categories of representation prohibited under the LSC restrictions. The forced separation of LSC grantee lawyers able to offer direct service from those non-LSC-funded lawyers able to offer only restricted forms of advocacy undercuts efforts of LSNY programs to ensure that clients who enter their offices will be able to obtain the services they genuinely need. The forced isolation of lawyers in the unrestricted program also would rob community-based LSNY offices of experienced attorneys who play an essential role within those offices.

Administrative Burdens

19. The program integrity regulation's requirements that LSC grantees maintain separate supervisory staffs, separate middle managers, and separate staff attorneys in physically separate settings is administratively unduly burdensome.

20. LSNY and its programs strive to minimize hierarchy and bureaucracy so as to direct precious financial resources to the greatest degree possible to the delivery of legal services to clients.

21. While it is sometimes possible in New York City for LSC grantee programs to refer clients to non-federally funded programs for representation in matters prohibited

under the LSC restrictions, these referral options are inherently problematic. The programs to which clients may be referred are themselves underfunded and understaffed, are committed to their own substantive agendas, and cannot guarantee that they will accept referred clients. For example, it is virtually impossible to refer routine cases, such as matters in housing court, in which the client's claims would be advanced if the client were able to seek an attorneys' fee award. Similarly, it is virtually impossible to refer cases involving basic civil claims of some LSC-ineligible immigrants, such as in consumer law matters, since so few programs in the city, LSC-funded or not, have the capacity to take on additional consumer law matters.

22. Moreover, in many instances, the LSNY program is the only program to possess particular expertise. Thus, MFY has substantial expertise in handling claims on behalf of mentally ill residents of adult homes. In light of this expertise, it makes little sense to refer to another provider the particular legal claims of a mentally ill resident who is ineligible for MFY's assistance because of the individual's immigration status. Similarly, SBLS possesses extensive expertise in handling the claims of individuals victimized by outrageous predatory lending practices. In light of this expertise, it makes little sense to refer to another provider the particular legal claims of an individual victimized by such a practice despite the fact that, in a given case, SBLS might believe that a lobbying effort would be of benefit to the client.

23. The forced creation and maintenance of affiliated restricted and unrestricted programs raises additional administrative problems, including crossed lines of

communication on client referrals, on funding applications, and on questions of legal strategy. The requirement of physical separation causes morale problems for lawyers operating under the restrictions, interferes with efforts of those programs to hire and retain high quality staff, and undermines the managerial authority of respective sets of restricted and unrestricted managers who must coordinate their respective efforts while not running afoul of the LSC restrictions and program integrity requirements.

24. An additional and pernicious aspect of the program integrity regulation is that it authorizes LSC to find LSNY or any LSC grantee in non-compliance if another affiliated, or even wholly separate, non-LSC funded program, at some point, engages in what is perceived by LSC to be too much unrestricted advocacy. 45 C.F.R. 1610.8. Under the regulation, the amount of unrestricted advocacy is a factor that can trigger LSC's review and a finding of non-compliance by the LSC grantee. Indeed, the overall vagueness of the regulation means that a program can, at any time, be found in violation of the regulation based not only on the amount of unrestricted advocacy conducted by another entity, but based on the particular configuration of any relationship between an LSC grantee and another program that shares board members, managerial staff, administrative staff, office space, office equipment, or other people, physical space and equipment or functions. The risk of possible sanction — including the high stakes concern that LSC could suspend payment of millions of dollars in LSC funds and effectively halt civil legal representation of thousands of residents of New York city — inevitably chills any relationship, including any formal affiliation, between an LSC grantee and a non-LSC grantee.

Appendix L

Financial Cost

25. The substantial costs associated with starting up and maintaining a physically and objectively separate program also interfere with efforts of LSC grantees to dedicate non-federal funds to forms of advocacy prohibited under the restrictions. LSNY does not have sufficient non-federal resources to justify forced expenditures on duplicative facilities, staff, executive directors, boards, office space, and on similar requirements. Expenditures of this nature would reduce the capacity of LSNY to meet the actual legal needs of clients.

LSC Believes that Physical Separation Wastes Funds

26. For the last several years, LSC has pressed LSNY and other programs in New York City and State, and nationally, to consolidate into larger organizations with fewer parts. LSC has promoted the view that larger programs can be better and more efficiently managed. LSC has explicitly insisted that consolidation of programs saves money and has emphasized the importance of efficiently spending program funds to provide client service. However, LSC is ignoring in the context of the program integrity regulation the values of efficiency and cost-savings it promotes when urging consolidation of legal services programs. In enforcing the program integrity regulation, LSC instead demands forced separation between the restricted and unrestricted affiliate components of any program, despite the specific programmatic, administrative, and financial costs, outlined above, that are inherent in operating such programs.

Appendix L

LSNY's Past and Present Involvement in *Velazquez*

27. In January 1997, LSNY was named as a defendant in *Velazquez v. LSC*, the comprehensive lawsuit challenging the 1996 restrictions. However, because LSC, not LSNY, was the entity charged by Congress with the responsibility to enforce the restrictions, and since LSNY was merely an LSC grantee, the parties agreed that LSNY did not play an essential role as a defendant. Thus, pursuant to a stipulation between all the parties, LSNY was dismissed from the case on March 19, 1997, without prejudice.

28. LSNY now moves to join *Dobbins v. LSC* as a plaintiff, moves to consolidate the *Dobbins* and *Velazquez* cases, and joins in the consolidated motion for a preliminary injunction.

Dated: New York, New York
December 7 , 2001

s/ Andrew Scherer
Andrew Scherer

APPENDIX M — DECLARATION OF JOHN C. GRAY DATED NOVEMBER 29, 2001

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

97 Civ. 00182 (FB)

CARMEN VELAZQUEZ, *et al.*,

Plaintiffs,

v.

LEGAL SERVICES CORPORATION, *et al.*,

Defendants.

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01 Civ. (FB)

DAVID F. DOBBINS, *et al.*,

Plaintiffs,

v.

LEGAL SERVICES CORPORATION,

Defendant.

DECLARATION OF JOHN C. GRAY

I, John C. Gray, declare as follows:

1. I am the Project Director of Brooklyn Legal Services Corp. B., more informally known as South Brooklyn Legal Services or SBLS. I have held this position for the past 31

years. I make this declaration in support of the plaintiffs' request for a preliminary injunction enjoining the enforcement of restrictions imposed by the Legal Services Corporation ("LSC") on the professional activities of lawyers employed by South Brooklyn Legal Services ("SBLS"), especially when those activities are funded entirely from non-LSC private and governmental sources.

2. SBLS is a non-profit corporation, organized under the law of the State of New York. The mission of SBLS is:

> to seek equal justice for low-income people in Brooklyn by providing a broad range of legal advocacy and information. In pursuing this goal, we try to work respectfully with individual clients and client groups to identify and address their legal needs; to help empower poor people to identify and defeat the causes and effects of poverty in their communities; to focus on matters that will have the greatest impact for low-income people; and to work cooperatively with the private bar and with other agencies and organizations serving poor people.

3. Since its founding 33 years ago, SBLS has received funding from many sources, including grants from LSC, federal grants from non-LSC sources, grants from the City and State of New York, and substantial private donations from individuals, private law firms, and charitable foundations. SBLS is now receiving funding from all these sources. One of the foundations from which SBLS receives funding is the New York Foundation.

4. LSC allocates funding to SBLS through an intermediary umbrella corporation, Legal Services for New York City (LSNY), which receives LSC grants to support the work of seven local corporations, including SBLS, and two branch offices in New York City that provide legal assistance to the poor. LSNY re-grants the LSC funds directly to each local corporation and branch office.

5. In calendar 2000, SBLS's audited income was $4,301,372, not including donated services. Of that sum, $1,440,329 was received from LSC. The rest—$2,861,043—was received from non-LSC sources, including $1,421,970 from government contracts, $260,026 from IOLA, and $1,179,047 from other sources.

6. Since its founding in 1968, SBLS has provided high-quality legal assistance to many thousands of poor clients including litigation, counseling, legislative and administrative advocacy, and community education and development. SBLS provides legal services to diverse communities of low-income individuals and families, including many people who are of color, disabled, elderly or otherwise disadvantaged.

7. Among South Brooklyn's more notable achievements was litigation compelling the New York City Board of Education to provide adequate educational opportunities to students with disabilities. The *Jose P. v Ambach* case resulted in a consent decree dramatically broadening the educational opportunities available to the disabled. The litigation is particularly relevant to this motion because the use of the class action mechanism was crucial to the result. Previous

efforts to seek judicial review of the widespread denial of needed services to students with disabilities had been mooted when the defendants provided relief to the individuals who complained without changing their overall practices. In my experience, it is not uncommon for government agencies to try to insulate a policy or practice from judicial review by granting individual relief in an effort to moot the more general challenge. In those situations, a class action is advantageous, not merely to provide efficient and effective relief to similarly situated plaintiffs, but also to preserve the jurisdiction of the court.

8. When the federal appropriations restrictions on LSC-funded Legal Services offices, including the restrictions on non-LSC funding took effect in 1996, SBLS transferred or withdrew from the more than 30 class actions its lawyers were then handling. Since that time, lawyers employed by SBLS have refrained from participating in class actions, or in any other activity banned by Congress and LSC, even though resort to one or more of the "restricted" activities would have allowed advocacy of SBLS lawyers to help many more low-income people. The compelled withdrawal from cases in 1996 and our inability to provide a full spectrum of legal services to poor clients today is particularly disturbing because SBLS possesses adequate non-LSC resources to fund the restricted activities without expending any LSC funds.

9. When LSC issued its "program integrity" regulations in 1997, permitting LSC grantees to offer "restricted" legal services through a separate legal program housed in a separate physical facility, SBLS's Board of Directors seriously considered establishing a separate non-LSC-funded entity

through which to represent clients in matters that otherwise would be prohibited under the restrictions.

10. While I believed it to be important to SBLS's mission to be able to provide the categories of service prohibited by the 1996 funding restrictions, I nevertheless recommended to the Board, and the Board agreed, that SBLS should not establish an affiliated program under the program integrity regulations. I believed and continue to believe that SBLS should not seek to establish a separate entity because establishing that entity would place an undue burden on SBLS for three reasons: (a) financial costs; (b) administrative burdens; and (c) programmatic drawbacks.

Financial Cost

11. In my opinion, the cost of creating and sustaining a separate affiliate would be too great to justify the reduction in service to clients that would be necessary to pay for separate programs. There is no way that SBLS could pay the start up costs of a new entity without substantially reducing the staff available to serve our already underserved client population. Furthermore, paying the operating costs associated with separate programs—renting separate office space, paying separate personnel, paying separate executive directors, operating separate computer networks, operating separate telephones, and maintaining separate furniture and files—would be enormously wasteful and unjustifiably reduce our ability to serve clients.

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Administrative Burden

12. In addition to financial cost, establishing and maintaining a separate entity to do restricted work would entail substantial administrative burdens. Separate entities would make effective communication and coordination among staff more difficult in every aspect of our work from referrals of clients between programs to applications for foundation and other private support. For example, casehandlers in the two programs would have to figure out how to discuss different matters being handled for the same client. Project directors would have to answer constant practical questions about allocation of staff. Separate boards would have to make decisions concerning of resources and fundraising efforts. Compliance with the program integrity would require continuing attention by all staff to compliance instead of serving clients, especially since an incorrect decision on a compliance issue could have serious consequences for the entire program.

Programmatic Drawbacks

13. Operating separate legal programs would also undermine the effectiveness of both programs and thus harm the client community. A great achievement of SBLS has been to forge close links between SBLS's lawyers and the communities we serve. These links have helped SBLS lawyers both earn the confidence of community residents and gain a better understanding of the reality of the lives their clients. In my experience, such confidence and understanding are crucial to a programmatically effective legal services program. Separation of the lawyers operating with LSC funds

and those operating with non-LSC funds would diminish the effectiveness of all the lawyers. Separation would also interfere with the dynamic ongoing communication that allows all staff to benefit from the unique experience of others.

Practical Impact of the Restrictions

14. The existence in New York City of non-LSC-funded providers of legal services allows SBLS to refer some people who needed restricted services to those organizations. But these non-LSC-funded organizations have not met all the needs of clients of SBLS for restricted services. The resources of the non-LSC-funded organizations are limited and the matters we want to refer are not always within the other programs' priorities. Even when a referral is possible, not all clients are able to use a referral effectively. Some fall through the cracks in the system.

15. The practical limitation on referring restricted matters to non-LSC-funded programs is illustrated by our current difficulty in obtaining representation for welfare recipients and their child care providers in securing retroactive payments for child care services from New York City. Using an innovative grant from the New York Foundation (NLF), SBLS provides legal and technical assistance to family-based child care provider networks in Brooklyn, thus helping to create both high-quality child care and employment opportunities for low-income parents. One goal is to help individual women, many of whom are in welfare-to-work programs, set up their own not-for-profit businesses to provide child care.

Appendix M

16. Although the legal work on behalf of poor women that SBLS undertakes with funding from NYF only occasionally necessitates litigation, sometimes litigation is essential to enable SBLS' clients to secure their legal rights. In those instances, NLF and SBLS both want to offer a full spectrum of legal services to the affected women. For example, when SBLS discovered that New York City had adopted a reimbursement formula for day care providers that wrongly assumed that a month has four weeks rather than 4.3 weeks, SBLS approached New York City to request that the erroneous reimbursement formula be corrected. When the City did not respond to the request, SBLS, relying on its NYF funds, filed a lawsuit in the New York courts on behalf of Jasmine Pabon (a mother on welfare) against the City of New York seeking payment of the correct amount of child care money. The class action restriction prohibited Ms. Pabon and SBLS from litigating *Pabon v. Turner* as a class action on behalf of the hundreds of similarly-situated poor women. New York City eventually agreed to a settlement involving a payment of $12,000 in retroactive child care costs and the prospective abandonment of the incorrect reimbursement formula. In the absence of a class action, however, it has proven impossible to provide relief to the hundreds of other low-income women who are clearly entitled to retroactive payments. Efforts to persuade non-LSC organizations to undertake the representation have thus far failed, as have efforts to find pro bono representation. In the absence of a class action, SBLS has been unable to provide effective legal representation to all the poor women injured by the City's illegal policy, even though NYF funded our child care network support project for exactly that purpose and the project is financed entirely with NYF funds.

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17. The attorneys' fee restriction prohibits SBLS from seeking attorneys' fees. This restriction weakens the effective leverage SBLS has when it is negotiating with public agencies over changes in policies and practices. The potential threat of having to pay attorneys' fees for the time spent by plaintiffs' attorneys encourages agencies to settle promptly on reasonable terms rather engage in drawn-out negotiation and litigation. The various attorneys' fees statutes were enacted exactly to encourage prompt compliance with the laws by public agencies. This statutory purpose is lost when LSC-funded attorneys are involved because of the attorneys' fees restriction. In situations like the *Pabon* case, for example, the lack of the threat of attorneys' fees tends to encourage foot-dragging by public agencies and therefore the effective denial of prompt and full relief to the low-income people injured by an illegal policy.

18. The LSC restriction on representation of certain aliens using non-LSC funds is particularly troubling in situations, like the family-based child care project, when some family members are American citizens and others are ineligible aliens. The administrative and legal burdens involved in artificially dividing a family into eligible citizen and ineligible alien components for the purposes of legal representation poses burdensome administrative, legal and moral problems. For example, some of the poor women to whom retroactive day care payments are owed pursuant to the *Pabon* case are ineligible aliens. Under current regulations, however, SBLS may not assist them even though non-LSC funds have been provided by the NYF to assure that the legal rights of ineligible aliens are not ignored.

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19. I understand that one purpose of the restriction on non-LSC funds is to prevent expenditure of LSC funds on prohibited activities. I believe, however, that this purpose can be fully accomplished by means other than the restriction on non-LSC funds-means that would interfere much less with the ability of SBLS to carry out both its own mission and the goals of its non-LSC funders. Careful bookkeeping and accounting requirements would assure that all fixed and variable costs associated with the delivery of restricted legal services are covered by non-LSC funds. Appropriate signage and public information material would assure that the public could distinguish between activities funded by LSC and activities funded from other sources.

20. For all of these reasons, I urge that plaintiffs' motion for preliminary injunctive relief be granted.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 29, 2001
Brooklyn, New York

s/ John C. Gray
John C. Gray

APPENDIX N — DECLARATION OF JAMES F. SCHMIDT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

97 Civ. 00182 (FB)

CARMEN VELAZQUEZ, *et al.*,

Plaintiffs,

v.

LEGAL SERVICES CORPORATION, *et al.*,

Defendants.

---

01 Civ. (FB)

DAVID F. DOBBINS, *et al.*,

Plaintiffs,

v.

LEGAL SERVICES CORPORATION,

Defendant.

DECLARATION OF JAMES F. SCHMIDT

I, JAMES F. SCHMIDT, declare as follows:

1. I submit this declaration in support of plaintiffs' motion for an injunction prohibiting defendant the Legal Services Corporation (LSC) from enforcing various unconstitutional restrictions.

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2. Since March 1981 I have been the Executive Director of plaintiff Farmworker Legal Services of New York, Inc. (FLSNY).

3. FLSNY provides legal services to indigent migrant and seasonal farm workers throughout the state. FLSNY represents its clients in litigation challenging civil rights abuses, unlawful working conditions, the payment of sub minimum wages, detrimental migrant labor camp housing conditions, unlawful pesticide exposure and other basic safety and health employment-related issues. FLSNY also represents its clients before legislative bodies and administrative agencies. FLSNY's mission is to assure that agricultural employers and housing providers in New York comply with the law, that government entities respect farmworkers' civil rights, and that farmworker exclusions from existing labor laws are eliminated.

4. FLSNY was created in 1981 from the merger of three separate legal services programs serving farmworkers - one serving western New York, one serving the Hudson Valley, and one serving Long Island. It is my understanding that LSC urged the programs to merge into one in order to increase the programs' efficiency and cost-effectiveness and to improve coordination between them. It is also my understanding that after the merger all of the staff from the three programs were kept on, but the programs operated under a single executive director in order to improve coordination between the attorneys and to save money.

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FLSNY's Rejection of LSC Funding

5. For almost twenty years, FLSNY received funding from LSC, as well as from other federal and state governmental entities, foundations, private donations, and attorneys' fee awards.

6. On July 1, 1996, however, FLSNY for the first time rejected LSC funding, and it has not received any LSC funding since that time.

7. FLSNY rejected LSC funding in 1996 because in that year Congress restricted the activities in which LSC-funded entities could engage, even when those activities were entirely paid for by non-LSC sources. As I describe below in paragraphs 24 to 40, many of the activities that Congress restricted are integral to FLSNY's mission.

8. FLSNY considered reapplying for LSC funding in March of 1997, when LSC issued proposed regulations setting out parameters under which LSC-funded entities could establish affiliated but separate entities to conduct restricted activities. However, we concluded that the conditions under which the regulations would permit us to establish an unrestricted affiliate would require us to operate in a way that was not in the best interests of our clients and that would not be cost-effective.

9. In June 1997, LSC issued its final rule establishing conditions under which LSC-funded programs could establish affiliated but separate entities to conduct restricted activities. That rule is codified at 45 C.F.R. § 1610.8. After

that rule was issued, FLSNY applied for LSC funding for 1998. Our intention was that once we received the LSC funding we would establish an independent not-for-profit corporation named Farmworker Legal Center Inc. (FLC) to take over FLSNY's restricted activities and to operate exclusively with non-LSC funds.

10. Under our proposal, LSC-funded FLSNY and unrestricted FLC would have had separate boards of directors, but some individuals would have sat on both boards.

11. LSC-funded FLSNY and unrestricted FLC would have maintained separate offices in both Rochester and New Paltz, separate executive directors, separate **bookkeeping** systems, and separate audits.

12. In Rochester, LSC-funded FLSNY and unrestricted FLC would have operated out of physically separate offices and would not have shared furniture or computer systems. In Rochester, LSC-funded FLSNY would have had one full-time attorney, one full-time paralegal, one full-time bookkeeper, and one full-time executive director, none of whom would have been shared with unrestricted FLC. Depending on our finances, the FLSNY and FLC offices in Rochester might have shared a copier, a fax machine, a reception-area and a common secretary.

13. In New Paltz, LSC-funded FLSNY and unrestricted FLC would have operated out of physically separate offices and would not have shared furniture or computer systems. The two programs would have shared one paralegal and one staff attorney (each working half-time in each program), with

LSC-funded FLSNY also having one additional full-time attorney. Depending on our finances, those offices might have shared reception areas with a common secretary.

14. After submitting this application, I realized that the dual office structure would require us to pay for duplicate executive director salaries, duplicate support staff salaries, duplicate audits and bookkeeping services, and other redundant administrative and overhead expenses. I calculated that this would cost us approximately $130,000 the first year, and approximately $80,000 every year thereafter. I was appalled at the idea of having to waste scarce legal services funds in this manner, when those funds are desperately needed to provide direct services to clients.

15. I also realized that it would be extremely difficult for the two programs to coordinate their activities if they did not share an executive director.

16. I consequently called LSC, and asked whether the program integrity regulation would be satisfied if the restricted and unrestricted programs did not engage in such unnecessary duplication but were still able to guarantee that LSC funds would not be spent on restricted activities, and if the two programs kept separate financial records, time records, and activity reports. I was told that this probably would not satisfy the program integrity requirement. FLSNY consequently withdrew the 1998 funding application.

17. As a result of the loss of LSC funding, FLSNY's staff shrank severely. Prior to the loss of funding, we were paying the salaries of five attorneys, four paralegals, five

support staff, and myself. We are now down to three attorneys, four paralegals, and myself — we are unable to afford to pay support staff.

Burdensomeness of the Dual Program Structure

18. I continue to believe that establishing a separate, unrestricted affiliate under the criteria outlined by LSC is infeasible for FLSNY because it would both interfere with our ability to provide legal services to migrants in New York State and because it would not be cost-efficient.

19. A dual program structure would discourage the farm workers with whom we work from turning to us. Because farm workers often lack experience and trust in the judicial system, a key to providing services to them is developing a trusting relationship with them. Refusing them services in one office on account of their alienage status or their need to engage in a class action or to seek an attorneys' fee award would undermine that trusting relationship.

20. Additionally, outreach to farm workers is much more effective when we can do intake immediately, instead of referring the workers to another office that will represent them. Labor camps are generally located in isolated rural areas without access to mass transportation, and often without access to telephones. Following up on a referral to a different *office* is consequently hard for many farmworkers.

21. LSC's requirements for maintaining a separate, unrestricted affiliate satisfying all of the requirements of the program integrity regulation would be particularly financially

burdensome for us because we maintain offices in both New Paltz and Rochester. Although maintaining two sets of offices increases our overhead costs, it is important for us to maintain offices in both of those places in order to enable us to serve as many of New York's migrant workers — who are spread out over all of New York's rural areas — as possible. However, maintaining two sets of offices in both locations is economically infeasible for an office such as ours, which operates on a very tight budget.

22. Maintaining a separate, unrestricted affiliate satisfying all of the requirements of the program integrity regulation would also be particularly difficult because of the nature of our work. In order to travel to the migrant camps where many of our clients live, we spend approximately $18,000 to $20,000 yearly in travel costs. Sending staff from each program to each camp would, of course, double that expense. Additionally, because our clients speak many different languages, we often need translators for client meetings and for our written materials. If we had to hold separate meetings with our LSC-eligible clients and our LSC-ineligible clients, we would have to pay for two translators where one currently suffices. Likewise, if we had to translate separate sets of legal papers filed by two different offices in one case, that would double our translation expenses.

The Importance of Engaging in Restricted Activities

23. If the restrictions that Congress placed on the use of non-LSC funding by legal services programs that receive any LSC funding were lifted, so that LSC-funded entities could use their non-LSC funding to engage in restricted

activities without having to establish a separate entity to do so, FLSNY would again apply for LSC funding. This funding would allow FLSNY to expand its services so that it could assist more migrant workers than it is currently able to assist. This would be very important because FLSNY is currently able to assist only 10 to 15 percent of the many thousands of migrant and farmworkers who seek its help.

24. If FLSNY were to accept LSC funding before the restrictions were lifted, the restrictions would interfere with the purposes for which New York State and plaintiff the New York Foundation allocate funding to FLSNY.

25. For example, FLSNY currently has a $185,000 grant from New York State's Interest on Lawyer Accounts program, which provides general funding for the representation of all categories and classes of farmworkers. FLSNY applied for that grant in part to enable it to do the categories of work that the LSC-funded programs in the state are unable to do.

26. Additionally, until this year FLSNY has received funding from the New York State Assembly. Last year, FLSNY received $76,000 from the Assembly.

27. FLSNY also has a $40,000 grant from plaintiff New York Foundation for general support for our work empowering farm workers. In applying for that funding we specifically explained that we are the only legal services program in New York that can provide legal services to farm workers regardless of their immigration status, that we would perform outreach to prospective clients, and that we would empower farmworkers to act collectively around employment and other issues.

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28. As I describe below, many of the activities that LSC restricts are integral both to the purposes for which FLSNY receives this funding and to FLSNY's mission of providing legal assistance to migrant and seasonal farm workers in New York State.

Representing Workers Regardless of Alienage Status

29. For example, in order to enforce legal protections for migrant workers FLSNY needs the freedom to be able to represent migrant workers who are ineligible for legal services under the LSC appropriations acts since 1996 and 45 C.F.R. part 1626 because of their alienage status. This includes workers brought into this country by their employers on H-2B visas; individuals granted Temporary Protected Status (granted to people from selected countries, like Honduras and Nicaragua, which the U.S. has recognized as in turmoil and therefore unsafe); aliens in exclusion or deportation proceedings; aliens who have not filed for permanent residence but who are the spouses, parents or unmarried children under age 21 of U.S. citizens; undocumented aliens; and others. Agricultural workers brought into this country by their employers on H-2A visas are also ineligible for legal services except in cases involving work contract issues.

30. FLSNY cannot discriminate against these categories of aliens when it provides legal services because it is often important for FLSNY to be able to represent all members of a farm labor crew, which can range from one worker to a hundred or more workers, or for FLSNY to be able to represent all residents of a migrant labor camp operated by an employer.

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31. Most migrant farm workers are recruited to work in New York State by agricultural employers or farm labor contractors. Employers and labor contractors frequently recruit farm workers who are from the same community or general region who have a history of working and socializing together. Additionally, employers and labor contractors and agricultural employers often recruit large extended families of farm workers.

32. A worker's membership in a crew often determines his or her housing assignment at a migrant labor camp and the farm work that he or she is allocated. Employment records are generally kept by the crew leader, and farm workers are often paid for their work as part of a crew. Individual migrant farm worker families, large crews working in New York State, and migrant labor camps operated by employers frequently include a broad mix of documented and undocumented workers. For example, a migrant farm worker family working in New York State often includes a mix of United States citizens, permanent resident aliens, and undocumented members.

33. It is important for FLSNY to be able to represent all members of a crew or all residents of a housing camp because when an employer or labor contractor violates federal and state protective labor laws, all members of the crew or housing camp are affected, regardless of their immigration status. Migrant workers are often afraid to exercise their rights individually because they fear retaliation from employers or their agents. As a result, they will often exercise their rights only if they are able to do so as part of a group. Failure to represent some farm workers because of

immigration status would, consequently, seriously weaken the position of farm workers who are United States citizens or permanent residents.

34. Additionally, if FLSNY were forced to discriminate on the basis of alienage status against members of a family, of a work crew, or of a housing camp in the provision of its legal services, the remaining members of that group would be confused and would grow to mistrust FLSNY. Many would refuse FLSNY's representation for that reason.

35. FLSNY is currently representing a number of aliens ineligible for LSC-funded assistance, including H-2B workers and others.

Outreach and Legal Education

36. Outreach and legal education to potential clients are also critical to FLSNY's mission. FLSNY educates farm workers about a variety of legal rights, including labor, employment, worker health and safety, and housing rights, and also the right to access public services and police protection without experiencing discriminatory treatment. After FLSNY educates farm workers about their legal rights, the workers often ask FLSNY to help assert those rights in court or before administrative or legislative bodies. Although LSC states that it permits its grantees to engage in outreach and legal education, it bars them from representing clients as a direct result of such outreach. Migrant farm workers often lack knowledge of their legal rights, so they are unlikely to exercise their rights if we are not able to educate them about those rights. Moreover, migrant workers often live in

isolated rural labor camps without telephones, so they are unlikely to learn that we are available to help them unless we are able to conduct outreach to them.

37. It would be nearly impossible for FLSNY to separate workers in a migrant camp by their alienage status when providing outreach and community legal education to them.

Seeking and Collecting Attorneys' Fee Awards

38. It is important to FLSNY's clients and to FLSNY's mission that FLSNY be able to seek and collect attorneys' fee awards when they are available. The prospect of having to pay an award is often effective in deterring farm employers from dragging out the litigation of cases that they are sure to lose. This saves our clients from having to endure arduous, time-consuming litigation and enables them to obtain their back-pay awards or other remedies more quickly. It also saves our resources and enables us to represent more clients than we would otherwise be able to represent.

39. Attorneys' fee awards are also an important source of revenue for FLSNY. Although our attorneys' fee awards fluctuate from year to year, we generally average approximately $40,000 to $50,000 yearly in attorneys' fee awards.

40. FLSNY is currently representing clients in a number of cases in which attorneys' fee awards may be available.

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Engaging in Class Action Litigation

41. It is important to FLSNY's clients and to FLSNY's mission that FLSNY be able to represent clients in class action litigation. Class actions are an important method of protecting migrant workers' rights because, as discussed in paragraph 28 above, migrant workers are often so afraid of retaliation that they will not assert their legal rights unless they are part of a group. Additionally, because migrant workers move often, so that it is often difficult to locate them, and because so many migrant workers are simply unaware that they have legal rights to enforce, a class action is often the only way to ensure that an employer is required to compensate all of the employees he has wronged, and not just the ones who are able to enforce their rights.

42. FLSNY is currently representing clients in several cases filed as class actions involving violations of federal and state labor laws. For example, it is representing Columbia County farm workers who were not paid overtime, and who were housed at an overcrowded and dangerous migrant camp, transported in unsafe vehicles, and not paid for all of the hours that they worked.

Administrative and Legislative Advocacy

43. Administrative and legislative advocacy, which LSC prohibits its grantees from engaging in, is also critical to FLSNY's mission. FLSNY appears frequently before administrative and legislative bodies to ensure that farm workers are not excluded from protective legislation, such as unemployment insurance, overtime pay, and labor laws.

Appendix N

Organizing

44. FLSNY's Farmworker Organizing Project works with farmworkers in western and central New York to educate farmworkers about their rights and empower them to act collectively around a number of issues, including obtaining collective leverage in negotiations with their bosses about terms and conditions of employment.

45. LSC prohibits its grantees from using LSC or private money to "act as an organizer, of any association, federation, labor union, coalition, network, alliance, or any similar entity." See 45 C.F.R. § 1612.9.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 15, 2001
New York, New York

s/ James F. Schmidt
JAMES F. SCHMIDT

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(2)

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06-1308

IN THE

Supreme Court of the United States

LEGAL SERVICES FOR NEW YORK CITY, *et al.*,

Petitioners,

—v.—

LEGAL SERVICES CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALAN LEVINE
Counsel of Record
RACHEL B. KANE
ALLISON HERSH
COOLEY GODWARD KRONISH LLP
1114 Avenue of the Americas
New York, New York 10036
(212) 479-6000

LORI PLOEGER
COOLEY GODWARD KRONISH LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, California 94306-2155
(650) 843-5000

Attorneys for Respondents

QUESTION PRESENTED

Whether the Second Circuit erred by holding, as it did when it issued its first opinion in this case in 1999, that the appropriate test for evaluating the constitutionality of LSC's "program integrity" rule, as applied to three legal service organizations who receive or want to receive federal funding, is whether the rule leaves the organizations "adequate alternative channels for protected expression."

PARTIES INVOLVED

The following are the parties to this case:

> Legal Services for New York City, South Brooklyn Legal Services, and Farmworker Legal Services of New York (Petitioners)
>
> Legal Services Corporation (Defendant)
>
> United States of America (Defendant)

The following additional parties participated in the case before the Second Circuit Court of Appeals:

> Community Service Society of New York, Inc.; Centro Independiente de Trabajadores Agricolas; Peggy Earisman; Lauren Shapiro; Andrew Connick; and the New York Foundation (Plaintiff-Cross-Appellants)

CORPORATE DISCLOSURE STATEMENT

Defendant Legal Services Corporation is a federally chartered corporation. It is not publicly held and does not issue stock. It has no parent companies or non-wholly owned subsidiaries.

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CITATIONS OF RELEVANT OPINIONS

The opinion of the Court of Appeals (App. 1a-35a) is reported at 462 F.3d 219 (2d Cir. 2006). The decisions of the district court (App. 36a-46a and 47a-145a) are reported at 356 F. Supp. 2d 267 (E.D.N.Y. 2005) and 349 F. Supp. 2d 566 (E.D.N.Y. 2004).

JURISDICTIONAL STATEMENT

The Second Circuit Court of Appeals issued its judgment on September 8, 2006. Plaintiffs filed their petition for rehearing and rehearing en banc on September 29, 2006. The Court of Appeals denied Plaintiffs' petition in an order filed on December 28, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions, statutes and regulations are involved in this case:

1. United States Constitution, Amendment 1.

2. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, H.R. 3019 (April 26, 1996) (App. 149a-158a).

3. 45 C.F.R. § 1610.8 (App. 169a-170a).

STATEMENT OF THE CASE

This case presents Petitioners' renewed attempt to put before this Court an issue that the Court has already declined to review. It is the latest iteration of a years-old series of challenges to Congress's power to focus the federal legal services program administered by Respondent Legal Services Corporation ("LSC") by conditioning the award of federal funds to grantees on compliance with certain federal restrictions.

The LSC Program

LSC is a non-profit government-funded corporation created by the Legal Services Corporation Act of 1974 "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a). Under this mandate, LSC makes and administers grants to local organizations that provide free legal assistance to indigent clients. From the outset of the LSC program, Congress has exercised its power to control how LSC grantees use federal funds. *See id.* at § 2996f(b) (prohibiting use of LSC funds in, *inter alia*, most criminal proceedings, political activities, and litigation involving nontherapeutic abortion, desegregation, or military desertion).

Despite its success in providing legal services for indigent clients, LSC has been surrounded by controversy since it was founded. *Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323, 327 (E.D.N.Y. 1997) (*"Velazquez I"*). Over the years, members of Congress and members of the public have criticized LSC for what they perceived to be

controversial and overly political activities on the part of some LSC grantees. As a result, funding for the federal legal services program has been in jeopardy since 1980, when LSC began to depend on annual appropriations bills for survival. *See Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1406 (D. Haw. 1997).

The 1996 Act

The congressional restrictions at issue were introduced in 1996, as part of Congress's effort to save the federal legal services program by limiting its scope. *See* Omnibus Consolidated Rescissions and Appropriations Act ("OCRAA") of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1321-53-56 (1996) ("the 1996 Act") at § 504 (App. 149a-158a). These restrictions (the "Substantive Restrictions"), which were implemented by regulations promulgated by LSC, limit the types of representations that LSC grantees may undertake, prohibiting grantees from engaging in certain "restricted activities" even with private funds. *See id.*; 45 C.F.R. § 1609 *et seq.* Among these implementing regulations is the "program integrity rule," which LSC promulgated to allow grantees to vindicate their constitutional rights to engage in restricted activities. *See* 45 C.F.R. § 1610.8 (App. 169a-170a). The program integrity rule permits grantees to establish controlled affiliates outside the LSC program that are free to engage in restricted activities, so long as the grantee does not provide LSC funding to the affiliate and maintains adequate legal, physical and financial separation from it.

Petitioners' First Round of Challenges

The *Velazquez* Plaintiffs asserted their initial challenge to the restrictions in 1997. The district court denied plaintiffs' motion for a preliminary injunction (*Velazquez I*, 985 F. Supp. at 344), and plaintiffs appealed the decision to the Court of Appeals for the Second Circuit. The Second Circuit upheld the validity of all but one (the "suit-for-benefits" limitation) of the congressional restrictions, as well as the program integrity rule. *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 773 (2d Cir. 1999) ("*Velazquez II*"). Relying primarily on three decisions of this Court (*Rust v. Sullivan*, 500 U.S. 173 (1991), *FCC v. League of Women Voters*, 468 U.S. 364 (1984), and *Regan v. Taxation with Representation*, 461 U.S. 540 (1983)), the Second Circuit held that "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Velazquez II*, 164 F.3d at 766. The Court further held, as a facial matter, that the program integrity rule allowed LSC grantees adequate alternative channels to establish controlled affiliates. *Id.* at 766-67.

All parties petitioned this Court for certiorari. The Court granted certiorari on the limited issue of the "suit-for-benefits" limitation, and affirmed the Second Circuit's holding that it was unconstitutional. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) ("*Velazquez III*"). One week after issuing that opinion, the Court denied Plaintiffs' petition for certiorari as to Plaintiffs' rejected challenges to the program integrity rule and the remaining Substantive

Restrictions. *Velazquez v. Legal Servs. Corp.*, 532 U.S. 903 (2001).

The Instant Challenge

In December 2001, ten months after the decision in *Velazquez III*, a new group of plaintiffs (the *Dobbins* Plaintiffs) filed a complaint against LSC in the Eastern District of New York purporting to assert facial and as-applied challenges to the program integrity rule and several of the Substantive Restrictions. This new case was consolidated with the *Velazquez* case, and both sets of plaintiffs moved for a preliminary injunction against enforcement of the restrictions. The district court—applying an "undue burden" test in which it compared the governmental interests served by the program integrity rule with the burdens imposed on the plaintiffs—held the rule to be "unduly burdensome" and preliminarily enjoined LSC from enforcing the program integrity rule as written. *Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566, 598-612, 613 (E.D.N.Y. 2004) ("*Velazquez IV*"), *modified*, 356 F. Supp. 2d 267 (E.D.N.Y. 2005).

On appeal, the Second Circuit reversed the district court's grant of a preliminary injunction, holding the district court had erred in applying the "undue burden" standard to the plaintiffs' claims. *Brooklyn Legal Servs. Corp. B v. Legal Servs. Corp.*, 462 F.3d 219 (2d Cir. 2006) ("*Velazquez V*"). Finding that Plaintiffs' "as-applied challenge is, in all relevant respects, on all fours with its facial counterpart in Velazquez II" (*id.* at 228), the Court held that the district court "should have used the adequate alternative test we articulated in Velazquez II" (*id.* at 232), and remanded the

case for further proceedings consistent with its opinion (*id.* at 236).[1] Contrary to Petitioners' contention, the Second Circuit's decision did not hold that "a theoretical option" to establish an affiliate was sufficient (Pet. 12); it instructed the district court to determine "as a factual matter" whether the program integrity rule leaves plaintiffs with "adequate alternative channels for protected expression." *Velazquez V*, 462 F.3d at 231. Petitioners now contend that the Second Circuit's decision was in error.

[1] The Second Circuit found that, far from "[h]ewing closely to the Second Circuit's first opinion in *Velazquez*," as Petitioners contend (Pet. 11), the district court had "either misunderstood or missed" the "guidance on the law" set forth in Second Circuit's opinion. *Velazquez V*, 462 F.3d at 221.

ARGUMENT

Certiorari is not warranted in this case. The Petitioners' purported "as applied" challenge to LSC's program integrity rule is indistinguishable from the facial challenge as to which this Court previously denied review. Because none of the Petitioners ever attempted to establish an affiliate, the record in this case is insufficiently developed to provide a concrete set of facts on which to decide the issue presented. In any event, the Second Circuit's decision was entirely consistent with this Court's precedent and provides no conflict meriting this Court's review.

I. This Case Presents the Same Issues as *Velazquez II*

The *Velazquez II* Court considered (and rejected) precisely the same arguments Petitioners now advance: that the program integrity rule is too expensive and inflicts unwarranted programmatic and administrative costs on grantees. The *Velazquez II* Court also considered essentially the same record that Petitioners advance now. Although as-applied challenges typically require greater factual development than do facial challenges, in this case Petitioners' "as-applied" challenge was based on essentially the same facts and arguments as those presented in support of the earlier facial challenge. Because none of the Petitioners entered into an affiliate relationship or attempted to enter into an affiliate relationship, Petitioners' renewed attempt to put before this Court an issue as to which the Court has already denied certiorari should be rejected.

Petitioners' assertion that the "District Court carefully compiled an uncontested record of the costs and burdens of compliance" (Pet. 10-11) misleadingly suggests the existence of an actual record and underplays the district court's role in creating the "record" in this case.

Soon after this Court's decision in *Velazquez III*, the lawyers for the *Velazquez* Plaintiffs announced their intention to pursue the as-applied challenge contemplated by *Velazquez II*. *See Velazquez II*, 164 F.3d at 767 ("Any grantee capable of demonstrating that the 1996 restrictions in fact unduly burden its capacity to engage in protected First Amendment activity remains free to bring an as-applied challenge to the 1996 Act."). At a status conference in June 2001, the district court asked Plaintiffs to submit a brief addressing whether any of them had standing to raise an as-applied challenge. After six months, the lawyers for the *Velazquez* Plaintiffs filed a new suit on behalf of a new group of Plaintiffs (*Dobbins v. LSC* or the "Dobbins action"), filed an unopposed motion to consolidate the *Dobbins* action with the *Velazquez* action, and moved for a preliminary injunction in both cases. The Plaintiffs' moving papers did not point to any attempt to enter into an affiliate relationship by any of the three legal service program plaintiffs (i.e., Legal Services of New York ("LSNY"), a current grantee; South Brooklyn Legal Services ("SBLS"), a current subgrantee; and Farmworkers Legal Services ("FWLS"), a program that decided not to apply for funding after the 1996 Act came into law). Rather, Plaintiffs predicated their as-applied challenges on the fact that the three program plaintiffs had "considered" forming affiliate relationships but decided against it. SF ¶¶ 28-29, 40-42, 62-68, App. 232a-233a, 234a, 237a-239a.

Because none of the Plaintiffs had entered into an affiliate relationship or attempted to enter into an affiliate relationship, LSC opposed the Plaintiffs' motion for a preliminary injunction and moved to dismiss the purported as-applied challenges for lack of standing and for ripeness. LSC argued that the Plaintiffs were merely reiterating the facial arguments already rejected by the *Velazquez* Courts. LSC's papers also established that in the years since the rule was implemented, several grantees had been able to establish affiliate relationships. SF ¶ 11, App. 226a; *see also* SF ¶¶ 8-10, App. 226a.[2]

In 2003, during oral argument on the Plaintiffs' motion for a preliminary injunction, the district court suggested that Plaintiffs rely on a 1997 proposal by Queens Legal Services Corporation ("QLSC")—a non-party to the lawsuit whose proposal was rejected by LSC because it provided for virtually none of the requisite separation[3]—to

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[2] While LSC does not keep track of how many of its grantees have established affiliate relationships with unrestricted legal service providers, as of May 2002, LSC was aware of at least seven unobjectionable affiliations. SF ¶¶ 9-11 *contra* Pet. 8. From public sources, LSC has reason to believe that many other grantees have been able to enter into compliant affiliations as well.

[3] QLSC, an LSC subgrantee under the umbrella of petitioner LSNY, submitted a proposal to LSC to create an affiliate organization with legal and bookkeeping separation from QLSC but virtually no separation of offices, equipment, or staff. SF ¶¶ 22, 26, App. 231a-232a. LSC had informed QLSC that that proposal would not satisfy the program integrity rule. LSC letter

fashion a proposal that would give them standing to challenge the program integrity rule. Recognizing the facial insufficiency of QLSC's proposal, the district court encouraged the Plaintiffs to submit a revised proposal to LSC.

In April and May 2003, Plaintiffs modified the QLSC proposal to add additional details, and ultimately submitted a revised proposal (the "Clarified Proposal"). SF ¶ 26, App. 232a; *see* App. 178a-186a. Notably, Plaintiffs submitted a single proposal for SBLS, FWLS, and LSNY, making no distinction between the entities, even though the organizations are very different in size and scope.

LSC considered and rejected the Clarified Proposal for essentially the same reasons as the original QLSC proposal, namely, that the Clarified Proposal on its face provided for absolutely no separation of offices, equipment, or personnel, but relied instead on the "mere book-keeping separation" that the program integrity rule explicitly declares insufficient. SF ¶ 27, App. 232a; *see* 45 C.F.R. § 1610.8(a)(3), App. 169a; *see also* App. 205a-221a.

Nevertheless, the district court held that Plaintiffs had standing to raise their as-applied claims based on LSC's rejection of their Clarified Proposal. *Velazquez IV*, 349 F. Supp. 2d at 598. In so holding, the district court did not address LSC's argument that the submission of a facially invalid proposal could not confer standing to assert a ripe as-

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to LSNY, dated September 10, 1997 at 2, incorporated into SF ¶ 24, App. 231a.

applied challenge. Thus, when LSC concluded that the Clarified Proposal would not pass muster, LSC was not required to weigh the various factors in the rule or "apply" it. This proposal was simply a vehicle for making the same generalized arguments this Court declined to review as a facial matter.

The district court enabled Plaintiffs to mount an as-applied challenge based on a court-created, fictional record. In reality, the only additional "evidence" in the record since *Velazquez II* is a series of declarations from grantees in the parties' stipulated facts upon which Petitioners rely heavily. *See* Pet. 7-8. These declarations are not based on any affiliation that has ever been created, but are based on Plaintiffs' beliefs concerning burdens the program integrity rule *might* impose on them. These hypothetical affiliations are based on the assumption that the program integrity rule (or LSC's enforcement of it) requires greater separation of personnel, equipment, and office space than it actually requires, thus inflating the burdens on Petitioners. At least two of these assumptions are false.

First, the burdens postulated by Petitioners are all based on the assumption that in a hypothetical affiliation, the petitioner would share absolutely no physical space with the unrestricted entity. *See* Pet. 7 (citing SF ¶ 25, App. 231a (QLSC considered creating an "affiliate which operated in a physically separate locality"), ¶ 41, 234a (SBLS considered an "affiliate which operated in a physically separate locality")); *see also* Pet. 6. But complete physical separation is not required by the rule. 45 C.F.R. § 1610.8(a)(3)(iii), App. 169a; *see e.g.*, LSC Office of Legal Affairs External

Op. No. EX-2003-1008 (May 8, 2003), App. 200a (Section 1610 may allow for "[a]ffiliates operating on separate floors" of same physical premises or "having offices on the same floor (perhaps with some shared space, such as a library), but with separate entrances for each organization"). Petitioners could reduce the cost of creating an affiliate by sharing *some* space.[4]

Second, the Petitioners' calculation of the costs of affiliating is based on the assumption that the LSC grantee and the unrestricted affiliate share at most one attorney. SF ¶ 25 (QLSC proposes sharing no staff), ¶ 41 (SBLS proposes sharing one attorney), ¶ 63 (FWLS proposing sharing no staff), App. 231a-232a, 234a, 238a; *see also* Pet. 6-7 (stating hypothetical, staff-related burdens). This degree of staff separation also is not required by LSC. Since attorney overlap of up to 10% would not necessarily violate the program integrity regulation (*see* LSC Office of Legal Affairs External Op. No. EX-2003-1008, App. 201a), SBLS which has 34 attorneys (SF ¶ 39, 234a), could share as many as 3 attorneys with an unrestricted affiliate. LSNY, a far

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[4] Petitioners repeatedly contradict themselves, reading the regulation correctly in one breath and then discounting it in the next. *See, e.g.*, Pet. 8 ("Section 1610.8 does not literally require physical separation of entire offices and staff (the regulation's text insists merely on legal separation, 'physical and financial separation' and 'separate personnel'")) *contra* Pet. 9 (criticizing LSC for rejecting Clarified Proposal, which proposed that affiliates "operate in one physical location" without any more detail as to how affiliates located on the same premises would actually maintain physical separation (Clarified Proposal ¶ 8, App. 185a)).

larger organization, could share a far greater number. This additional sharing of staff would also significantly reduce the cost of creating an affiliate.

Petitioners also argue that the rule's separation requirement would impose crippling administrative and programmatic burdens on them. Pet. 7-8. But Petitioners have never attempted any measures to minimize these types of burdens. For example, a grantee may well be able to use a single coordinating attorney to facilitate communication between the grantee and the affiliate. On the record before the district court, there was no information concerning the effectiveness of such a measure. That is precisely the type of real world data required to assert an as-applied challenge.

In reality, Petitioners have not entered into an affiliate relationship, attempted to enter into an affiliate relationship, or submitted a genuine proposal to LSC because they do not want as-applied relief limited to a finite number of grantees in specifically defined circumstances. They want the same sweeping invalidation of the rule that they sought and were denied in *Velazquez II*.[5] With the district court's help,

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[5] Petitioners do not hide their true motive, but rather blatantly attempt to take a second bite at the apple on their facial challenge to the program integrity rule. For instance, their reasons for granting certiorari include such non-particular grounds as that the regulations "severely impede the ability *of more than one hundred legal programs* across the United States" to use non-federal funds and "threaten the viability and proper operation of newly emerging cooperative ventures between the public and private sectors, and between the state and federal governments" (Pet. 13) (emphasis added), and that "unless the [Second Circuit's] opinion is

Petitioners have brought a facial challenge in as-applied clothing. Having declined to review Petitioners' facial challenge once, the Court should decline to do so again.

Moreover, review of *Velazquez V* would be premature as the Second Circuit did not decide the merits of this case. Petitioners argue that the Second Circuit "misconstrued the notion of an adequate alternative channel of communication." Pet. 25. Petitioners contend that the alternative offered by the program integrity rule is "extremely" (*id.* at 16) and "massively" burdensome (*id.* at 25, *see also id.* at 19), and "impose[s] a massive deterrent – if not an outright prohibition – on the unrestricted use of state, local and private funds" (*id.* at 12), and therefore presents merely "a theoretical option" (*id.*). For this reason, Petitioners argue, the Second Circuit erred in vacating the preliminary injunction. But Petitioners mischaracterize the nature of the Court's decision. The Court did not make any determination as to whether the program integrity rule provides Petitioners with an "adequate alternative channel" of expression. Rather, the Second Circuit ruled on the appropriate standard for this determination and remanded the case to the district court for determination of whether "as a factual matter" the program integrity rule satisfies this standard, as-applied to Petitioners. *Velazquez V*, 462 F.3d at 231. Since the district court has not made this determination, a review of Petitioners' claims by this Court would be premature.

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reviewed, the federal government's power to use funding conditions to censor disfavored speech will be dramatically enhanced" (*id.* at 14).

II. The Second Circuit's Decision was Consistent with Supreme Court Precedent

Petitioners assert several arguments as to why the Second Circuit's decision was in error. Although Petitioners attempt to frame these arguments as turning on decisions this Court has issued since it declined to hear this case in 2001, (*see* Pet. 16 (contending Second Circuit decision "[c]ontravenes *United States v. American Library Association*"); 20 (contending decision "[c]ontravenes" *Rosenberger v. Rector and Visitors of the University of Virginia* (and *Velazquez III*))), Petitioners are actually challenging the "adequate alternative channel" standard the Second Circuit articulated in *Velazquez II*. When reduced to their essence, Petitioners' arguments are that the adequate alternative standard is inappropriate because restrictions attendant on the receipt of federal funds satisfy the unconstitutional conditions doctrine only if (1) the resulting burden is "insubstantial" and (2) those restrictions constitute the least restrictive means of achieving the government's goals. These arguments misconstrue the holdings of this Court.

A. The Adequate Alternative Channel Test is Derived From and Consistent with This Court's Decisions on Unconstitutional Conditions

As the Second Circuit stated when it first considered the claims asserted by the *Velazquez* Petitioners in 1999, "[t]hree Supreme Court cases provide the framework for evaluating plaintiffs' unconstitutional conditions claim."

Velazquez II, 164 F.3d at 765 (discussing *Rust v. Sullivan*, 500 U.S. 173 (1991); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); and *Regan v. Taxation with Representation*, 461 U.S. 540 (1983)).

In *Taxation with Representation* ("*TWR*"), 461 U.S. 540, a not-for-profit organization known as TWR challenged an Internal Revenue Code provision that forbade tax-exempt organizations from engaging in lobbying. TWR claimed that the provision violated the First Amendment by forcing it to choose between receiving tax-deductible status and exercising its right to engage in lobbying. The Supreme Court rejected this claim. After noting that the tax-exempt status was a federal subsidy equivalent to a cash grant, the Court held that the provision did not place an unconstitutional condition on TWR's right to free speech because the Internal Revenue Code allowed TWR to pursue its lobbying efforts through an affiliated, non-tax-exempt organization. *Id.* at 544. In so holding, the Court acknowledged that "TWR would, of course, have to ensure that the [tax-exempt] organization did not subsidize the [affiliate]" so that public funds were not spent "on an activity Congress chose not to subsidize." *Id.*

In *League of Women Voters*, 468 U.S. 364, the second case of the Supreme Court trilogy, the Court affirmed this principle by striking down a statute that did not provide grantees an alternative channel of expression. In that case, a radio station challenged a federal law prohibiting radio stations that received federal funding from editorializing. The Court held that the statute violated the First Amendment, but indicated that, if "Congress were to adopt a revised

version of [the law] that permitted . . . stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid under the reasoning of" *TWR*. *Id.* at 400. As the Court later elaborated, "[s]uch a scheme would permit the station 'to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities.'" *Rust*, 500 U.S. at 197 (quoting *League of Women Voters*, 468 U.S. at 400).[6]

In *Rust*, 500 U.S. 173, the third case, the Supreme Court upheld federal regulations that conditioned receipt of "family planning" funds on recipients' agreement not to advance abortion as a method of family planning. The Supreme Court rejected the various claims asserted by the plaintiffs, among them a claim that the regulations imposed an unconstitutional condition on the grantees' exercise of

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[6] Plaintiffs cite *League of Women Voters*, 468 U.S. at 398-99, for the proposition that the "government cannot burden speech without any legitimate reason for doing so . . . even when the speech restriction takes the form of a condition on the receipt of federal funds." Pet. 15. But, the Court did not apply the traditional First Amendment analysis to which Petitioners point to the government's argument that the restriction was a permissible exercise of the spending power. In the latter analysis, the Court noted that the availability of an affiliate organization would make the restriction "plainly . . . valid," suggesting that the sole determining factor is whether the grantee has an alternative avenue for the restricted activity. *Id.* at 400.

their First Amendment rights. The Court held that the regulations did not impose an unconstitutional condition because they "[did] not force the . . . grantee to give up abortion-related speech; they merely require[d] that the grantee keep such activities separate and distinct from the [federally-subsidized] activities." *Id.* at 196. In so holding, the Court upheld the constitutionality of a program integrity rule that is essentially identical to the rule in this case.[7]

"Taking these cases together," the Second Circuit held, in *Velazquez II*, that "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Velazquez II*, 164 F.3d at 766. Seven years later, when confronted with the "as-applied" claims asserted by the *Velazquez* and *Dobbins* Plaintiffs, the Second Circuit concluded that plaintiffs' "as-applied challenge is, in all relevant respects, on all fours with its facial counterpart in Velazquez II." *Velazquez V*, 462 F.3d at 228. Since its prior decision in *Velazquez II* remained the controlling case, the Second Circuit held that the district court "should have used the adequate alternative test we articulated in Velazquez II," not the "undue burden" standard, to evaluate Petitioners' as-

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[7] In *United States v. American Library Association ("ALA")*, 539 U.S. 194 (2003), this Court's most recent unconstitutional conditions decision, a four-judge plurality specifically reaffirmed the central holding of *Rust* that the government is "entitled to define the limits" of federal programs by "insisting that public funds be spent for the purposes for which they were authorized." *Id.* at 211 (quoting *Rust*, 500 U.S. at 196).

applied claims. *Id.* at 232. Concluding that "[t]he district court is in a better position to make this fact determination," the Court decided to "leave it to that court to do so in the first instance utilizing the correct standard," and remanded the case. *Id.* at 231.

B. The Unconstitutional Conditions Doctrine Does Not Support Application of An Undue Burden Test

Although petitioners do not expressly argue that the program integrity rule should be evaluated under an undue burden standard, they claim that the Second Circuit erred by "refus[ing] to weigh the massive burden on speech imposed by the requirement of physically separate facilities against the proffered governmental interests." Pet. 19-20. Petitioners argue that in applying the unconstitutional conditions doctrine, "the Court has consistently drawn a bright line between government's power to insist that funding recipients respect limits on the use of federal funds, and the government's power to control a grantee's private expression paid for by its own separately raised funds." *Id.* at 17. Thus, Petitioners claim, while the Court has upheld restrictions imposing "insubstantial burdens" on privately funded speech, it has never upheld restrictions imposing "substantial burdens" on such speech, except where the speech at issue was deemed government speech. *Id.*; *see* 17-21 (*comparing TWR*, 461 U.S. 540; *League of Women Voters*, 468 U.S. 364; and *ALA*, 539 U.S. 194, *with Rust*, 500 U.S. 173). Since the speech at issue in this case is private speech and not government speech, Petitioners contend, the burdens are too substantial for the program integrity rule to be upheld. In

support of this argument, Petitioners take various portions of these decisions out of context in an attempt to recast the "burdensomeness" of the restriction as the determining factor in the Court's decisions. This attempt to recast this doctrine is not persuasive.

First, Petitioners cite *TWR* as a case that turned on the "ease with which a 'subsidized' speaker could establish an affiliate organization" (Pet. 17), arguing that Justice Blackmun's concurrence suggested that "if formation of the unrestricted affiliate were unduly burdensome, the statute would be unconstitutional" (*id.* at 18). To the contrary, while the Court noted that a requirement that TWR form a separate entity for lobbying was "not unduly burdensome" (*TWR*, 461 U.S. at 544 n.6), and Justice Blackmun expressed a concern about the scope of additional restrictions (*id.* at 553-54), the *TWR* Court acknowledged that further regulations would be necessary to prevent the tax-exempt deductions received by the subsidized organizations from cross-subsidizing the lobbying conducted by the unsubsidized affiliates (*id.* at 544). But since the *TWR* statute did not include specific program integrity regulations, and TWR did not claim that it was "unable" to operate within the dual structure, the Court did not decide what level of separation could be required. *Id.* at 544 n.6.

Petitioners similarly mischaracterize *League of Women Voters*. Petitioners concede that the Court held, in that case, that a requirement that the radio station create a separate entity to editorialize with nonfederal funds would not violate the First Amendment. Pet. 18. But Petitioners then seize on the phrase "use the station's facilities" to

suggest that a "regulation that required a separate transmitter in a separate physical space staffed by separate personnel would have imposed an undue – and therefore, unconstitutional – burden on privately funded speech." *Id.* Since the *League of Women Voters* Court did not consider a specific program integrity rule or the degree of separation between the subsidized and unsubsidized entity, Petitioners simply speculate about the meaning of the Court's dictum.[8]

Finally, Petitioners contend that this Court's most recent unconstitutional conditions case, *ALA*, 539 U.S. 194, "treated as dispositive the minimal burden the statute imposed," and suggested that an as-applied challenge to the statute would be evaluated according to an undue burden-type balancing test. Pet. 19. In that case, the plurality upheld a federal statute providing that public libraries may not receive federal funding to provide Internet access unless they install software to block obscenity and child pornography. Although several of the opinions filed in that case do refer to the burdens imposed by the statute, they refer to the burdens on library patrons to obtain the censored information, not the burdens on the libraries themselves to establish alternative channels of expression (*see ALA*, 539 U.S. at 209; 214-15

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[8] Later, in another section of their Petition, Petitioners blatantly misrepresent this Court's opinion in *League of Women Voters*, claiming that "the Court explicitly rejected the notion that Congress could require broadcasting stations to editorialize in physically separate facilities to prevent confusion over the scope of federal funding." Pet. 22. As discussed above, the Court did not address what degree of separation would be appropriate or constitutional.

(Kennedy, J., concurring); 219-20 (Breyer, J., concurring); 234-35 (Souter, J., dissenting)), presumably because the Court questioned whether public libraries had First Amendment rights in the first place (*id.* at 210-11). Thus, a suggestion that a balancing of the burdens and interests might be appropriate in that case does not support Petitioners' contention that such a test would apply in this case, where the relevant question is whether the program integrity rule precludes *grantees* from establishing "alternative channels of expression." Thus, none of the cases Petitioners cite support their contention that the level of burden is the determining factor in an unconstitutional conditions case.

Unable to escape the fact that this Court, in *Rust*, upheld a program integrity rule nearly identical to the one at issue in this case, Petitioners argue that *Rust* is not applicable because the doctors in *Rust* were deemed to be delivering government speech. Pet. 20-21. Thus, Petitioners argue, the Second Circuit erred in relying on *Rust*. *Id.* at 21. But, as every relevant Supreme Court case since *Rust* has explained, this "government-as-speaker" analysis applies only when the courts evaluate viewpoint-based restrictions on speech. *See ALA*, 539 U.S. at 213 n.7 (explicitly rejecting Petitioners' argument, as set forth in Justice Stevens' dissent); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30, 834 (1995) ("It does not follow . . . [from *Rust*] that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.")); *Board of Regents v. Southworth*, 529 U.S. 217, 234-35 (2000) (explaining that government as speaker analysis is necessary

to evaluate viewpoint-based restrictions on speech). In fact, in *ALA*, a plurality of this Court specifically rejected Petitioners' interpretation of *Velazquez III*: "*Velazquez* held only that that *viewpoint-based restrictions* are improper 'when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *ALA*, 539 U.S. at 213 n. 7 (quoting *Rosenberger*) (emphasis modified). Since the restrictions at issue in this case are viewpoint-neutral, this distinction is irrelevant.

C. The Unconstitutional Conditions Doctrine Does Not Require that Congress Employ the Least Restrictive Alternative

Petitioners argue, in various ways and in various sections of their Petition, that the program integrity rule is unconstitutional because LSC and the government could have achieved the goals of avoiding both subsidization and the appearance of subsidization of restricted activities through less restrictive means. Pet., *e.g.*, 15 (Second Circuit erred "by failing to require LSC to offer any justification for imposing a massive burden on privately funded speech"); 26 (describing physical separation requirement as "nothing short of overkill, akin to 'burn[ing] the house to roast the pig'") (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). In support of this argument, Petitioners refer to unrelated constitutional and statutory schemes that allow for less separation between subsidized and restricted activities. Pet. 23 (Establishment Clause does not require physical separation between government-funded and religious activities); 24 (Faith-Based Initiative only requires that

government-funded and religious activities take place in different rooms or at different times). *See also* Pet. 22 (Court's opinion in *League of Women Voters* suggested in *dicta* that physical separation between federally-funded programming and privately funded editorials would not be necessary).

Petitioners' argument ignores the fact that, when, as here, a restriction is a condition on the receipt of a federal subsidy, not an affirmative restriction, the government need not apply the least restrictive means.[9] As this Court has recognized, "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977).

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[9] Notably, none of the cases Petitioners cite involve conditions on federal subsidies. *See Republican Party v. White*, 536 U.S. 765 (2002) (holding Minnesota Supreme Court's canon of judicial conduct prohibiting judicial candidates from announcing views on disputed legal and political issues violates the First Amendment); *Mitchell v. Helms*, 530 U.S. 793 (2000) (holding federal program under which federal funds used to buy educational materials lent to religious schools did not violate Establishment Clause); *Capitol Sq. Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (holding State would not violate Establishment Clause by permitting private party to display religious symbol in traditional public forum); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (holding ordinance prohibiting homeowners from displaying most signs on property violated First Amendment); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (holding requirement that mall allow individuals to exercise speech on premises did not violate mall owner's First Amendment or property rights).

"Constitutional concerns are greatest when the State attempts to impose its will by force of law." *Id.* at 476. By contrast, "subsidies are just that, subsidies. The recipient is in no way compelled to operate a [subsidized] project; to avoid the force of the regulations, it can simply decline the subsidy . . . By accepting [federal] funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income." *Rust*, 500 U.S. at 199 n.5.

Thus, when the Supreme Court has considered restrictions associated with governmental subsidies, it has not evaluated those restrictions under "the exacting means-end scrutiny this Court requires when a regulation imposes content-based restrictions on private speech." Pet. 25.[10] As

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[10] For this reason, the cases cited by Petitioners are inapposite. *See Watchtower Bible & Tract Soc'y of New York, Inc. v. Stratton*, 536 U.S. 150 (2002) (ordinance restricting door-to-door canvassing violated First Amendment because not narrowly tailored to village's stated interests); *Reno v. ACLU*, 521 U.S. 844 (1997) (federal statute prohibiting transmission of obscene, indecent or patently offensive material to persons under 18 years of age violated First Amendment because overbroad and not narrowly tailored to government's interests); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530 (1980) (state order prohibiting inclusion of inserts discussing controversial policy issues in electric bills violated First Amendment because order not narrowly tailored to compelling state interest); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996) (federal statute requiring operators of leased public, educational, or governmental TV channels to segregate and block "patently offensive" programming violated First Amendment because statute not appropriately tailored to achieve underlying objective); *Church*

Petitioners point out, this does not mean that conditions attached to the receipt of federal subsidies are "immune from First Amendment scrutiny." Pet. 16 (citing *Velazquez III*, 531 U.S. 533; *Rumsfeld v. Forum for Acad. & Inst'l Rights*, 547 U.S. 37 (2006); *Speiser v. Randall*, 357 U.S. 513 (1958)).[11] Rather, as discussed above, this Court has applied a "rational basis" test that asks only if the restrictions actually amount to a "wholesale prohibition" on the exercise of the constitutional rights, i.e., whether the restrictions leave the plaintiff with "adequate alternative channels of protected expression" outside the governmental program. *Velazquez II*, 164 F.3d at 765. Thus, a restriction associated with a governmental subsidy need not impose the least restrictive means in order to survive scrutiny under the unconstitutional conditions doctrine.

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of the Lukumi Babalu Aye, Inc. v. City Of Hialeah, 508 U.S. 520 (1993) (ordinance prohibiting animal sacrifice violated First Amendment Free Exercise Clause because not narrowly drawn to serve compelling government interest); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992) (ordinance permitting government to set fee for assemblies and parades based on estimated cost of maintaining public order violated First Amendment because statute lacked adequate procedural safeguards and tied amount of fee to content of speech); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (petitioner's conviction under statute criminalizing sale of obscene material violated Fourteenth Amendment because legislation not reasonably restricted to "evil with which it is said to deal").

[11] Nor does it mean that the government's interests are completely irrelevant. *Velazquez V*, 462 F.3d at 230 (collecting cases).

Petitioners cite *Velazquez III* for the proposition that "[f]unding restrictions may not be used to carry out . . . a viewpoint-based exercise in censorship." Pet. 27. But Petitioners overlook the fact that the restrictions at issue in this case, unlike the restriction this Court struck down in *Velazquez III*, are not viewpoint-based.[12] The welfare "suits for benefits" limitation at issue in *Velazquez III* precluded grantees from challenging the validity of the welfare system. Thus, the Court was concerned that since a challenge to a welfare law could arise for the first time in the middle of a case, the suit-for-benefits restriction might exclude certain speech from the courtroom. *Velazquez III*, 531 U.S. at 545, 546 (issue might not become apparent until "the midst of litigation proceedings" and the LSC attorney would be forced to withdraw from the representation). By contrast, the restrictions at issue in this case limit the types of cases LSC grantees may take on at the outset, not the types of arguments they may assert. Since the type of representation is generally evident when the representation commences, the concerns articulated in *Velazquez III* are not applicable.

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[12] Petitioners contend that the restrictions are viewpoint-based but offer no support for that argument. Petitioners merely make a baseless and circular contention that "[t]he lack of a legitimate justification for the requirement of physical separation compels an inference that the requirement is designed to deter disfavored speech." Pet. 26.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be denied.

Dated: April 30, 2007

Respectfully submitted,

Alan Levine
Counsel of Record
Rachel B. Kane
Allison Hersh
Cooley Godward Kronish LLP
1114 Avenue of the Americas
New York, NY 10036
212-479-6000

Lori Ploeger
Cooley Godward Kronish LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306-2155
650-843-5000

Attorneys for Respondent
Legal Services Corporation

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No. 06-1308

In the Supreme Court of the United States

LEGAL SERVICES FOR NEW YORK CITY, ET AL.,
PETITIONERS

v.

LEGAL SERVICES CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
BARBARA L. HERWIG
MATTHEW M. COLETTE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

The "program integrity" regulation issued by the Legal Services Corporation, 45 C.F.R. 1610.8, requires recipients of federal funds to maintain "physical and financial separation" between the federally-funded entity and any affiliate that engages in restricted activity with non-federal funds. The question presented is whether the "program integrity" regulation is consistent with the First Amendment.

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In the Supreme Court of the United States

No. 06-1308

LEGAL SERVICES FOR NEW YORK CITY, ET AL., PETITIONERS

v.

LEGAL SERVICES CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 462 F.3d 219. The opinion of the district court (Pet. App. 36a-46a) is reported at 356 F. Supp. 2d 267. An earlier memorandum and order of the district court (Pet. App. 47a-145a) is reported at 349 F. Supp. 2d 566.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2006. A petition for rehearing was denied on December 28, 2006 (Pet. App. 146a-147a). The petition for a writ of certiorari was filed on March 28, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1974, Congress enacted the Legal Services Corporation Act of 1974, 42 U.S.C. 2996 *et seq.* That Act created the Legal Services Corporation (LSC) as an independent, non-profit corporation to provide financial assistance to programs that furnish legal assistance to the poor. 42 U.S.C. 2996e(a)(1)(A). LSC grantees also often receive funds from state and local governments and private sources. Pet. App. 4a.

Congress has long imposed restrictions on the activities that LSC recipients may undertake. In 1996, Congress enacted new restrictions. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(d)(1), 110 Stat. 1321. The new restrictions place limits on representing undocumented aliens, collecting attorney's fees, soliciting clients, lobbying, and bringing class action lawsuits. See, *e.g.*, § 504(a), 110 Stat. 1321-53. Congress has reenacted the restrictions in annual appropriations acts since 1996. See, *e.g.*, Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, § 502(a), 110 Stat. 3009-59. The Act applies these prohibitions not only to recipients' use of LSC funds, but also to their use of non-federal funds from state and local governments and private donors. See 1996 Act §§ 504(d)(1) and (2), 110 Stat. 1321-56, 1321-56 to 1321-57.

Soon after enactment of the restrictions, a district court in Hawaii granted a preliminary injunction against enforcement of the restrictions as applied to a grantee's use of non-LSC funds on the ground that they likely violated the First Amendment as so applied. *Legal Aid Soc'y* v. *Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997). In response to that decision, LSC promulgated the program integrity regulation that petitioners chal-

lenge here. 62 Fed. Reg. 12,101 (1997). That regulation allows grantees "to have an affiliation or relationship with separate organizations which may engage in prohibited activities funded solely with non-LSC funds." *Id.* at 12,102.

Under the regulation, an affiliate of an LSC grantee may spend non-federal funds on restricted activities as long as the affiliate maintains its "objective integrity and independence" from the grantee. 45 C.F.R. 1610.8(a). Objective integrity and independence are deemed to exist where (1) the affiliated organization is "legally separate" from the grantee; (2) the affiliate "receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities;" and (3) the affiliate is kept "physically and financially separate" from the grantee. 45 C.F.R. 1610.8(a)(1)-(3).

The regulation specifies that "[w]hether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts." 45 C.F.R. 1610.8(a)(3). The relevant factors include, but are not limited to, (1) "[t]he existence of separate personnel;" (2) "[t]he existence of separate accounting and timekeeping records;" (3) "[t]he degree of separation from facilities in which the restricted activities occur, and the extent of such restricted activities;" and (4) "[t]he extent to which signs and other forms of identification which distinguish the recipient from the [affiliated] organization are present." 45 C.F.R. 1610.8(a)(3)(i)-(iv).

The Hawaii district upheld the program integrity regulation against a First Amendment challenge. *Legal Aid Soc'y* v. *Legal Servs. Corp.*, 981 F. Supp. 1288, 1293-1298 (D. Haw. 1997). The Ninth Circuit affirmed, *Legal Aid Society* v. *Legal Services Corp.*, 145 F.3d 1017

(1998) (White, J., sitting by designation), and this Court denied a petition for a writ of certiorari. 525 U.S. 1015 (1998).

2. In January 1997, petitioner Legal Services of New York City and others (*Velazquez* plaintiffs) filed suit challenging the program integrity regulation on, *inter alia*, First Amendment grounds. Pet. App. 6a. The United States intervened to defend the constitutionality of the LSC program. The district court rejected plaintiffs' First Amendment claim. *Velazquez* v. *Legal Servs. Corp.*, 985 F. Supp. 323 (E.D.N.Y. 1997).

The court of appeals affirmed in part and reversed in part. *Velazquez* v. *Legal Servs. Corp.*, 164 F.3d 757, 759 (2d Cir. 1999), aff'd in part, 531 U.S. 533 (2001), and cert. denied in part, 532 U.S. 903 (2001). The court rejected the *Vesazquez* plaintiffs' facial challenge to the program integrity regulation, explaining that the government may impose restrictions on recipients of federal funds as long as it allows adequate alternative channels for constitutionally protected activity. *Id.* at 765-766. The court left open the possibility of an as-applied challenge. *Id.* at 767. The court also held that a substantive provision refusing to fund claims to amend or change existing law constituted impermissible viewpoint restriction. *Id.* at 769-772.

This Court affirmed the Second Circuit's viewpoint discrimination holding. *Velazquez* v. *Legal Servs. Corp.*, 531 U.S. 533 (2001). The Court denied review on all other issues. 532 U.S. 903 (2001).

3. On remand, the *Velazquez* plaintiffs pressed their as-applied challenge in the district court. Pet. App. 8a. Another group of plaintiffs (including petitioners South Brooklyn Legal Services and Farmworker Legal Services of New York) brought a separate action challeng-

ing the program integrity regulation, and the two cases were consolidated. *Ibid.*

Petitioners thereafter submitted a proposal to LSC, seeking approval to create "affiliates" that would engage in restricted activities with non-LSC funds. Pet. App. 9a. The proposal, as clarified, would have created affiliates that would occupy the same offices, and use the same attorneys, the same support staff, and the same equipment as the three LSC recipients. C.A. App. 804-808. LSC rejected the proposal, concluding that the proposed 100% sharing of physical space, equipment and staffs, demonstrates that the proposal as a whole fails to provide the requisite physical and financial separation. Pet. App. 9a.

Finding that petitioners had established a "probability of success" on their as-applied challenge to the program integrity regulation, the district court issued a preliminary against enforcement of the regulation. Pet. App. 144a-145a. Applying an "undue burden" balancing test, the court concluded that the burdens of satisfying the program integrity regulation are substantial, and that the government's interests in not subsidizing the restricted activities and in avoiding the appearance of government support for those activities are not sufficiently weighty to justify those burdens. *Id.* at 126a-144a.

4. As relevant here, the court of appeals vacated the district court's decision and remanded for further proceedings. Pet. App. 16a-29a, 35a. The court of appeals first held that the district court erred in adopting an "undue burden" test for assessing the constitutionality of the program integrity regulation that was drawn from cases where the government directly burdened certain constitutional rights. The court concluded that the un-

due burden standard applied in those cases is not the correct test for assessing the constitutionality of conditions on funding. *Id.* at 19a-20a.

The court of appeals next held that, in applying its undue burden standard, the district court had incorrectly required the government to establish that the program integrity regulation was the "least-restrictive-means" for serving the government's interests. Pet. App. 20a. The court concluded that the least-restrictive-means standard applies to direct regulation cases, not to government funding cases. *Ibid.* In the funding context, the court explained, the relevant means-ends inquiry is whether "the government's interests are so attenuated from the benefit condition as to amount to a pretextual device for suppressing dangerous ideas or driving certain viewpoints from the market place." *Id.* at 21a.

The court of appeals then held that the proper standard for assessing the constitutionality of the funding condition must focus on whether the plaintiffs have "adequate alternative channels for protected expression." Pet. App. 24-25a. The court explained that "restrictions that unduly burden the ability of an organization to set up adequate alternative channels for protected expression such that they are in effect precluded from doing so should be subject to invalidation." *Id.* at 25a-26a. The court concluded that the district court had failed to determine whether "the potential alternative channels were adequate in light of burdens imposed." *Id.* at 26a. The court therefore remanded to the district court to "make factual findings under the adequate alternative test * * * and consider whether the associated burdens in effect preclude the plaintiffs from establishing an affiliate." *Id.* at 27a.

ARGUMENT

Petitioners seek review of the court of appeals' decision vacating the district court's entry of a preliminary injunction against enforcement of the program integrity regulation and remanding for further factual findings on whether the regulation leaves adequate available channels for petitioner to exercise their First Amendment rights. The decision below is interlocutory, and there is no reason to depart from the general rule that this Court will review only final judgments. In any event, the court of appeals' holding is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition for a writ of certiorari should therefore be denied.

1. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari). The interlocutory nature of the order "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893) (The Court generally should not review interlocutory order absent "extraordinary" circumstances.); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002) ("[I]n the absence of some * * * unusual factor, the interlocutory nature

of a lower court judgment will generally result in a denial of certiorari.").

This case is doubly interlocutory. First, the district court did not enter a final judgment on the constitutionality of the program integrity regulation as applied to petitioners. Instead, it entered a preliminary injunction against enforcement of the regulation as applied to petitioners based on a finding that petitioners had established a "probability of success" on the merits of their as-applied challenge. Second, the court of appeals did not even finally dispose of petitioners' request for a preliminary injunction. Instead, the court of appeals vacated the district court's grant of a preliminary injunction and remanded for the district court to make factual findings on whether the program integrity regulation leaves adequate alternative channels for petitioners to engage in activity protected by the First Amendment. Pet. App. 27a, 35a.

Nor does this case present any reason to depart from the general rule against review of interlocutory orders. To the contrary, this case is particularly ill-suited for immediate review by this Court. Even if petitioners were correct that a finding on whether the program integrity regulation leaves adequate alternative channels for petitioners to engage in protected activity is not as important to the constitutional analysis as the court of appeals deemed it, it is plainly relevant to the analysis. Accordingly, it would be premature to review the validity of the program integrity regulation without a finding on that issue. Moreover, if, on remand, petitioners establish that there is not an adequate alternative channel for engaging in protected activity, the issue they now seek to present would become moot. On the other hand,

should petitioners not prevail on the adequate alternative issue, they will be able to challenge the district court's determination on that issue in the court of appeals. And, if the court of appeals affirms, petitioners may then seek this Court's review, challenging the determination on the adequate alternative channels issue as well the court of appeals' holding that such an inquiry is required. Especially in these circumstances, there is no reason for the Court to deviate from its normal practice of denying review of interlocutory orders.

Proceedings in the district court may also help to clarify other related factual issues that may be relevant to the constitutional analysis. For example, petitioners complain that the program integrity regulation imposes unwarranted burdens based on the assumption that the regulation requires that no physical space may be shared and at most one attorney may be shared. The regulation, however, does not impose either requirement. See Legal Services Corp. Br. in Opp. 13-14. A remand would permit the district court to make a finding on the true costs of complying with the regulation. For that reason as well, review of the court of appeals' interlocutory decision on the propriety of the district court's entry of a preliminary injunction would be premature.

2. In any event, the court of appeals correctly held that the district court erred in failing to undertake an inquiry into whether the program integrity regulation leaves adequate alternative channels for petitioners to engage in protected activity. That holding is consistent with this Court's decisions on the scope of Congress's authority under its spending power.

In *Regan* v. *Taxation with Representation*, 461 U.S. 540, 545 (1983), the Court held that Congress could reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations. In so holding, the Court explained that such an organization would be free to create an affiliate to conduct its lobbying activities without tax-deductable contributions. *Id.* at 544. Given that alternative, the Court concluded that Congress had not infringed any First Amendment right to engage in lobbying activity, but had instead simply chosen not to pay for lobbying activities. *Id.* at 546.

In *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), the Court invalidated a law providing that noncommercial television and radio stations that receive federal grants may not engage in editorializing. The Court explained that the vice of the law was that it absolutely barred the recipient from editorializing with wholly private funds. *Id.* at 400. The Court added that if Congress were to permit recipients to establish affiliate organizations that would use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would be valid. *Ibid.*

In *Rust* v. *Sullivan*, 500 U.S. 173, 197 (1991), the Court explained that *League of Women Voters* and *Regan* establish that Congress may not use its spending power place a condition on a recipient that "effectively prohibit[s] the recipient from engaging in * * * protected conduct outside the scope of the federally funded program." Applying that principle, the Court upheld a regulation that barred grantees from engaging in abortion counseling as part of the federal program, but allowed the grantees to engage in such counseling through

programs that were separate and independent from the grantees' federally assisted programs. *Id.* at 196-198.

Consistent with those cases, the court of appeals correctly concluded that petitioners could not establish that the program integrity regulation is invalid simply because operating a separate and independent program would impose additional costs and burdens. As the court of appeals explained, a showing of such additional burdens is relevant, but the ultimate inquiry is whether petitioners are in effect prevented from establishing an adequate alternative channel for engaging in protected activity. Pet. App. 25a-26a.

Only one other court of appeals has addressed the question of the appropriate standard for evaluating the constitutionality of the program integrity regulation, and it has reached the same conclusion as the court below. In *Legal Aid Soc'y* v. *Legal Servs. Corp.*, 145 F.3d 1017, 1026 (1998), the Ninth Circuit held that the program integrity regulation does not violate the First Amendment because "[a] recipient of LSC funds may engage in conduct protected by the First Amendment outside the scope of the federally funded program if, as in *Rust*, the recipient sets up a separate entity that complies with the program integrity regulations." The court explained that the "proper constitutional test" focuses on "whether the regulations 'effectively prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program.'" *Id.* at 1026 (quoting *Rust*, 500 U.S. at 197). The court of appeals also acknowledged that "[p]resumably, the restrictions make it more difficult for organizations to engage in prohibited activities," but noted that "the fact that the LSC restrictions may require additional compliance ef-

forts" was insufficient to warrant their invalidation. *Id.* at 1027.

3. Petitioners offer no reason why the Court should grant review at this interlocutory stage. Nor do they assert that there is any conflict in the circuits that would warrant review. Instead, petitioners seek review based on the assertion that the court of appeals adopted an incorrect legal standard for evaluating the constitutionality of the program integrity regulation. Even if that claim had merit, it would not provide a basis for reviewing an interlocutory decision that does not conflict with a decision of any other court of appeals. In any event, petitioners' claim lacks merit.

a. Petitioners contend (Pet. 16-20) that, under this Court's decisions, a separate and independent affiliate requirement is permissible only if the costs and burdens associated with the creation of an affiliate are insubstantial. But the only majority opinion petitioners cite (Pet. 17-18) merely stated in a footnote that a separate incorporation requirement was "not unduly burdensome." *Regan*, 461 U.S. at 544 n.6. Petitioners err in contending that the "ease" of establishing an affiliate was "crucial" to the that decision. Because the grant recipient did not claim that it was unduly burdened in operating an affiliate, the Court did not purport to define what kind of burden would be constitutionally permissible. And while three justices joined a concurring opinion suggesting that further restrictions would have raised constitutional problems, *id.* at 552-553 (Blackmun, J. concurring), that opinion, by definition, did not speak for the Court.

Petitioners also vastly overstate (Pet. 18) the significance of this Court's observation in *League of Women*

Voters, 468 U.S. at 400, that it would "plainly be valid under the reasoning of [*Regan*]" for Congress to provide, as a condition on the receipt of federal funds, that a subsidized entity must form a separate affiliate that could "use the station's facilities" to editorialize with non-federal funds. A statement that a particular arrangement would plainly be valid under the Constitution in no way suggests that a different arrangement in a completely different context is unconstitutional.

Petitioners also err in contending (Pet. 18-20) that the court of appeals' holding is contrary to *United States* v. *American Library Ass'n*, 539 U.S. 194 (2003) (*ALA*). That case did not address the existence of adequate alternative channels of expression, because the Court held that the statute did not impose a substantial burden on First Amendment rights in the first place. The plurality in that case held that a statute requiring libraries, as a condition of federal funding, to install software to block obscenity and child pornography did not violate the First Amendment rights of the libraries or their patrons. *Id.* at 208-214. The plurality explained that "[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance." *Id.* at 212.

Petitioners rely on Justice Kennedy's concurring opinion in *ALA*. But that concurring opinion merely stated that if a librarian can unblock filtered material upon request, "there is little to this case." *Id.* at 214 (Kennedy, J., concurring). Contrary to petitioners' assertion (Pet. 19), Justice Kennedy did not state that "a plaintiff would be entitled to an as-applied First Amendment exemption" upon a showing that it would be unduly burdensome to unblock websites or disable filters. He

merely stated that if some libraries are unable to disable the filtering software or "if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject of an as-applied challenge." *Id.* at 215 (Kennedy, J., concurring). A statement that a particular set of circumstances may give rise to an as-applied challenge does not constitute a holding that anything more than an insubstantial burden violates the Constitution. And Justice Kennedy's opinion did not purport to address the very different context presented here.

Petitioners also fail to come to grips with the decision in *Rust*, which upheld regulations that are virtually identical to the regulations at issue here, which have governed the LSC program for ten years. Relying on this Court's decision in *Velazequez*, petitioners argue (Pet. 20-21) that *Rust* is not controlling because that case involved a program funding government speech rather than private speech. But "*Velazquez* held only that *viewpoint-based* restrictions are improper 'when the [government] does not itself speak or subsidize transmittal of a message it favors." *ALA*, 539 U.S. at 213 n.7 (emphasis supplied). If the Court in *Velazquez* had instead intended a sweeping change in the law for all cases involving the legal services program, the Court would presumably have vacated and remanded the Second Circuit's decision on the restrictions at issue here, rather than denying certiorari immediately after deciding *Velazquez*. See p. 4, *supra*.

b. Petitioners also contend (Pet. 15) that the court of appeals erred in holding that the program integrity regulation can be upheld even if it is unrelated to any legiti-

mate justification. The court of appeals, however, held no such thing. The court of appeals recognized that the government's asserted interests are not irrelevant to the constitutional analysis, and that "[w]hen the government's interests are so attenuated from the benefit condition as to amount to a pretextual device for suppressing dangerous ideas or driving certain viewpoints from the marketplace, then relief may indeed be appropriate." Pet. App. 21a.

The court of appeals did hold that the district court had engaged in an inappropriate assessment of the government interests furthered by the program integrity regulation. But that was because the district court had engaged in an inquiry into whether the program integrity regulation constituted the least restrictive means of serving the government's legitimate interests. Pet. App. 20a. That aspect of the court of appeals' decision is correct. No decision of this Court addressing the validity of funding conditions suggests that such conditions are invalid unless they serve the government's legitimate interests through the least restrictive means. Petitioners do not cite any case that supports such a least-restrictive-means inquiry in the funding context.

Moreover, there is an appropriate fit between the program integrity regulation and the interests it is designed to further. For example, Congress has a legitimate interest in ensuring that the legal services organizations that they fund devote their energy and resources to providing the basic legal services funded by the statute. That interest is furthered by a requirement that lawyers working on LSC-funded cases focus on those cases. Congress could reasonably conclude that lawyers that split their time between funded activity and non-

funded activity would not as effectively accomplish the activities that Congress sought to fund. By prohibiting the practice of using 100% of the same lawyers to perform funded and unfunded work, the program integrity regulation appropriately furthers that legitimate interest.

The government also has a substantial interest in preventing public confusion about whether the government supports a particular activity. See *Rust*, 500 U.S. at 188; *League of Women Voters*, 468 U.S. at 395. Petitioners contend (Pet. 22) that this interest can be furthered in other ways. But as discussed above, in the funding context, the government is not required to pursue its interests through the least restrictive means.

In any event, petitioners err in contending (Pet. 22) that disclaimers and signs are fully adequate to dispel public confusion. Those measures do not address general public perceptions. Under the district court's injunction, an LSC-funded legal services provider could use the same lawyers in the same office to handle both restricted and non-restricted cases. If a citizen were to learn through the media that a particular provider is handling a major redistricting case, there is a significant risk that the citizen would not distinguish between the LSC grantee and its affiliate, and would believe that the litigation is being funded with a federal grant despite the statutory prohibition on such activity.

Petitioners contend (Pet. 23-24) that the government was required to follow the same approach that it follows in "charitable choice" programs that govern the receipt of funds by faith-based organizations. But the two programs serve different objectives. The charitable choice programs are designed to ensure that "all eligible orga-

nizations, including faith-based and other community organizations, are able to compete on an equal footing for Federal financial assistance used to support social programs." Exec. Order No. 13,279, 3 C.F.R. 259 § 2(b). In that context, separation requirements serve the limited purpose of ensuring that government does not fund inherently religious activity in violation of the Establishment Clause of the First Amendment. The LSC program integrity regulation, by contrast, is designed to ensure that funds are spent only to support the activities Congress wished to fund, to ensure that those who receive LSC funds maintain their primary focus on the LSC program's core mission, and to ensure that there is not public confusion about whether the government supports activities outside that core mission.

c. Petitioners' contention (Pet. 27) that the program integrity regulation imposes viewpoint-based restrictions is insubstantial. Restrictions on representing undocumented aliens, collecting attorney's fees, soliciting clients, lobbying, and bringing class actions are plainly viewpoint neutral.

4. Finally, petitioners suggest (Pet. 13) that certiorari should be granted because the LSC restrictions "severely impede" the operation of more than 100 legal services programs. But petitioners have never asserted that they cannot form affiliates—they simply believe it would be inefficient to do so, despite the substantial federal subsidies made available through the LSC. Moreover, contrary to petitioners' assertion (Pet. 8), many legal services organizations have successfully formed and operate affiliates consistent with the program integrity regulation. See C.A. App. 901-902.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

BARBARA L. HERWIG
MATTHEW M. COLETTE
Attorneys

JUNE 2007

(4)

No. 06-1308

IN THE

Supreme Court of the United States

LEGAL SERVICES FOR NEW YORK CITY,
SOUTH BROOKLYN LEGAL SERVICES, and
FARMWORKER LEGAL SERVICES OF NEW YORK,

Petitioners,

v.

LEGAL SERVICES CORPORATION and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

PETER M. FISHBEIN
JOSEPH M. DRAYTON
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

BURT NEUBORNE
Counsel of Record
LAURA K. ABEL
REBEKAH DILLER
DAVID H. GANS
DAVID S. UDELL
BRENNAN CENTER FOR JUSTICE
AT NYU LAW SCHOOL
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6737

Attorneys for Petitioners

210423

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari. and there are no amendments to that statement.

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Petitioners respectfully submit this reply to briefs in opposition to certiorari filed by respondent Legal Services Corporation ("LSC"), and the Solicitor General ("SG") (collectively, the "government briefs").

1. This case challenges the government's unprecedented effort to place massive burdens on the ability of LSC-funded lawyers to use private, state and local government funds (referred to as "private funds") to offer their indigent clients the legal techniques routinely available to all other litigants. The SG's suggestion that such burdens are longstanding is simply inaccurate. Until the enactment of the restrictions at issue in 1996, Congress had not sought to impose restrictions on the use of funds from state and local governments, and had not sought to limit the lawyering techniques available to LSC-funded lawyers.

2. The government's briefs inaccurately describe the record:

First, the SG fails to mention significant aspects of the "Clarified Proposal," in which petitioners formally requested permission from LSC to channel their non-federal funds through an affiliate. SG Br. at 5. The proposal is carefully designed to avoid both subsidization of the forbidden speech, and public confusion over whether government endorses that speech. It provides for: (a) formal legal separation; (b) an identifiably separate name; (c) substantial signage and disclaimers to distinguish the respective activities of each affiliate; (d) scrupulous record-keeping and accounting; and (e) separation of the activities of each affiliate into separate rooms or separate times in a shared space.[1] These measures provide far greater protection against cross-subsidization and confusion than does the federal government's so-called Faith-Based Initiative, which does not require legal separation, disclaimers or signage.

1. The Clarified Proposal is reproduced at App. 178a.

See, e.g., 24 C.F.R. § 92.257(b), (d); 28 C.F.R. § 38.1(b), (c). Indeed, LSC concedes that the Clarified Proposal would satisfy its interests in avoiding subsidization and confusion. App. 214a-215a.

Second, while the government acknowledges that the restriction at issue burdens petitioners' ability to use non-federal funds for protected speech, it contends that petitioners and the District Court overstate the degree of separation required between petitioners' federally funded, approved activities and privately funded, disapproved activities. LSC Br. at 11-13; SG Br. at 9. But the government ignores the District Court's specific assumption that LSC would allow the programs to share some physical space, personnel and equipment when it calculated the burden on petitioners. *See* A-234a (calculation of burden imposed on South Brooklyn Legal Services is based on sharing an attorney); A-238a (calculation of burden imposed on Farmworker Legal Services is based on sharing physical space, personnel and equipment). This assumption was generous. Neither the regulations in question, nor the government briefs, nor LSC's formal rejection of petitioners' Clarified Proposal make any effort to quantify the level of separation that LSC would find acceptable. Indeed, LSC's careful use of wiggle words, such as "not necessarily," "may" and "may well," is clearly designed to preserve the option to impose whatever level of separation LSC desires. *See, e.g.*, LSC Br. at 12, 13. Far from a saving grace, the regulation's vagueness is an independent vice, chilling private speech by making it virtually impossible for LSC recipients to gauge what level of physical separation LSC will insist on.

Third, the government's claim that numerous legal services programs have established affiliates under the regulations is unfounded. LSC Br. at 9; SG Br. at 17. On the contrary, the record demonstrates that: a) several of the affiliates to which the government points do not engage in restricted speech;

b) several have simply given up seeking to operate a unified program and have re-organized as two completely unaffiliated organizations with massive losses of efficiency and coordination; and c) the ability of the rest to serve their clients is severely undermined by the extremely burdensome nature of the restrictions. In sum, the government cannot identify a single convincing example of affiliated organizations operating with less than extreme burden.

3. Several concessions in the government briefs underscore the fact that the petitioners' Clarified Proposal satisfied the government's legitimate interests. *First*, LSC admits in its rejection of the Clarified Proposal that its requirement of burdensome substantial physical and personnel separation is not necessary to further any serious government interest in preventing cross-subsidization or preventing public confusion. Indeed, LSC candidly argues that it is not obliged to provide any justification at all for the severe burdens it imposes on petitioners' speech. LSC Br. at 23-26.

Second, the SG argues that the severe speech burdens are justified to avoid the risk of public confusion. SG Br. at 15-16. But, given LSC's concession that the signage and disclaimers described in the Clarified Proposal are sufficient to avoid confusion, such a contention is insupportable. Moreover, the SG's argument is based on implausible worst-case scenarios, and this Court has repeatedly invalidated censorship designed to avoid such speculative concerns over the possibility of public confusion. Cert. Pet. at 22-23.[2]

2. The SG also half-heartedly argues that separate physical facilities are needed to assure that federally funded lawyers are not diverted from congressionally approved tasks. SG Br. at 15. Tellingly, it cites no District Court finding to this effect, nor any evidence before the District Court that would have allowed it to make such a finding, because no such evidence exists.

I.

REVIEW IS NECESSARY TO RESOLVE A BURGEONING DISPUTE OVER GOVERNMENT POWER TO IMPOSE MASSIVE AND UNJUSTIFIABLE BURDENS ON GRANT RECIPIENTS

The government pins its legal case on the erroneous assertion that the Spending Clause empowers it to impose severe, unjustifiable burdens on the privately funded speech of grantees, as long as the burdens deter, but do not "effectively preclude" that speech. SG Br. at 6, 11; LSC Br. at 22. The government's position is, however, on a collision course with this Court's cases regarding conditions on the speech rights of federal grantees, and with its related cases regarding the speech rights of government employees and contractors. Both lines of precedent require scrutiny of the adequacy of the government's justifications for imposing substantial burdens on the private speech of persons receiving federal benefits.

The government misreads the seminal "unconstitutional conditions" cases. In *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), and *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court held that funding conditions imposing *insubstantial* burdens on privately funded free speech are constitutional, precisely because the conditions do not operate to deter the speech. At the same time, the Court recognized that funding conditions imposing a *substantial deterrent* to privately funded speech must undergo classic First Amendment scrutiny. Cert. Pet. at 17-18.

The government argues that these cases support funding conditions that impose massive burdens on a grantee's ability to use private funds for First Amendment activities, as long as the burdens merely deter, but do not effectively preclude, the

privately funded speech. LSC Br. at 16-21; SG Br. at 12-13. However, the fair import of the cases, particularly when read together with the government employee speech cases discussed below, forbids the government from using funding conditions to place unjustifiably severe burdens on a grantee's use of its private resources to engage in First Amendment activity. Cert. Pet. at 17-18.

If any doubt persisted concerning the legal standard established in *Regan* and *League of Women Voters*, it was dispelled by *United States v. American Library Association*, 539 U.S. 194 (2003), upholding a funding condition that required filters on privately funded computer terminals in federally subsidized libraries. The plurality opinion noted that the funding condition required merely that a patron ask that the filter be turned off. Since this trivial burden did not deter privately funded speech, the plurality upheld the condition. Cert. Pet. at 18-20.

Justice Breyer explicitly based his concurrence on the trivial nature of the burden, and the importance of the government's interest in protecting children. 539 U.S. at 220. Justice Kennedy's concurrence likewise stressed the trivial nature of the burden, while cautioning that if turning off the filter significantly burdened privately funded free speech in a given setting, a library patron would be entitled to seek as-applied relief. *Id.* at 214.

Although Justices Breyer and Kennedy provided the crucial votes for upholding the funding restriction, the SG simply ignores Justice Breyer's concurring opinion. Even worse, the SG seeks to turn Justice Kennedy's opinion into a bait and switch maneuver, where a library patron experiencing severe burdens is invited to seek as-applied relief, only to be told that severe burden and substantial deterrence is not enough. SG Br. at 13-14.

The government's reading of *Rust v. Sullivan*, 500 U.S. 173 (1991), is equally flawed. The government argues that *Rust* upheld a funding condition requiring separate physical facilities for privately funded speech about abortion because the restriction did not "effectively prohibit[ ]" the privately funded speech. SG Br. at 10. However, *Rust*, especially as it has been interpreted by this Court in *Velazquez v. Legal Services Corporation*, 532 U.S. 903 (2001) ("*Velazquez I*"), is fully consistent with this Court's long-standing refusal to permit burdensome speech conditions in the absence of a showing of genuine government need. In *Velazquez I*, this Court held that the primary government interest underlying the *Rust* regulations – a need to shield the government's family planning message from being garbled – does not exist in the context of the legal services program, where the government is not delivering any message. *Id.* at 541-42. In the absence of such an important governmental interest, burdensome restrictions on private speech such as those imposed by *Rust* are simply unconstitutional.

The Court's government employee speech cases similarly demand that the government justify a severe burden on private speech by showing that it is tailored to serve important government interests. *See, e.g., U.S. v. National Treasury Employees Union* ("*NTEU*"), 513 U.S. 454, 475 (1995) (holding that regulations burdening government employees' private speech are constitutional only if the government can "'demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way'") (quoting *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664 (1994)). These cases are highly relevant here, because in *Board of County Commissioners v. Umbehr*, the Court recognized that the government has more latitude to regulate the private speech of government employees, such as the *NTEU* plaintiffs, than to restrict the private speech of government independent

contractors, "who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing." 518 U.S. 668, 680 (1996). *Umbehr* and *NTEU*, thus, reinforce the unconstitutional conditions cases discussed above, making clear that the imposition of severe burdens on the private speech of persons receiving government funds must *always* be justified by a genuine need to advance important governmental interests.

Whether one measures the constitutionality of such a severe burden on free speech under traditional strict scrutiny, as the *League of Women Voters* Court said applies in the regulation of government grantees in the non-broadcast context, 468 U.S. at 375-76, a form of heightened scrutiny, as Justice Breyer's *American Library Association* concurrence urged, 539 U.S. at 216-18, or the *NTEU* standard discussed above, the First Amendment requires that when the government seeks to impose severe burdens on privately funded free speech, the burdens must always be justified by and tailored to serve important government interests. The Spending Clause is not an exception to the First Amendment.

This Court should hear this case for three important reasons. First, the government's "effective preclusion" standard, endorsed by the Circuit panel, is a blueprint for massive, and discriminatory, government censorship. Indeed, subsequent to the filing of the petition for certiorari herein, the U.S. Agency for International Development ("USAID") and U.S. Department of Health and Human Services ("HHS") adopted guidelines importing the LSC separation regime into the international public health arena. These guidelines apply to non-profits receiving federal funds to fight HIV/AIDS overseas that want to use their non-government funds to engage in privately funded speech on a crucial public health issue: the government's

treatment of prostitution in the fight against HIV/AIDS. The guidelines are explicitly modeled on the LSC restrictions, and both agencies point to the Circuit panel's upholding the LSC restrictions in this case as the reason for adopting the LSC model. USAID, Acquisition & Assistance Policy Directive 05-04 Amend. 1 (July 23, 2007);[3] HHS, Guidance, 72 Fed. Reg. 41076-01 (July 26, 2007).

The SG's labored effort to justify the Executive Branch's favored treatment of religious speech (which faith-based federal grantees may conduct in the same physical space in which they engage in government-funded speech), is utterly unpersuasive. Indeed, if anything, the risk of an Establishment Clause violation calls for greater concern with physical separation in the religious context than in the legal services and public health contexts.

Second, the government's insistence on the power to impose funding conditions that result in unjustifiably severe burdens on privately funded free speech by government grantees threatens the viability of emerging public/private partnerships designed to deliver services far more effectively than either private parties or the federal government could achieve on their own.

Third, the huge expense needed to operate and maintain redundant legal programs in separate physical settings with separate equipment and separate personnel has effectively deterred petitioners – and legal services programs across the United States – from deploying their private and non-federal resources efficiently to provide indigent clients with desperately needed legal representation. *See* discussion *supra* at 2-3. Given the threadbare nature of the government's legal position, and the huge stakes for the administration of justice, this case clearly merits review.

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3. Available online at http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04_amendment1.pdf

II.

THE CASE IS RIPE FOR REVIEW

The SG (but not LSC) urges this Court to defer review pending additional proceedings in the District Court. However, requiring such a time-consuming detour after more than ten years of litigation would be both superfluous and unfair, especially in the context of a longstanding First Amendment controversy affecting the delivery of legal services to millions of poor people. *See City of Littleton, Colo. v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 782 (2004) (discussing the "constitutional need" for courts "to avoid 'undue delay result[ing] in the unconstitutional suppression of protected speech'") (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 228 (1990)).[4]

In fact, the District Court has carefully assembled a voluminous record, meticulously quantified the severe burdens the separation requirement imposes on petitioners' privately funded speech, and fully considered the government's proffered interests. *See* Cert. Pet. at 10-12. The District Court found that, with a slight modification, the terms of the Clarified Proposal fully protect the government's legitimate interests, rendering the severe burdens imposed by LSC violative of the First Amendment as applied to petitioners. *Velazquez v. Legal Servs. Corp.*, 349 F. Supp.2d 566, 607-613 (E.D.N.Y. 2004), App. 126a-144a, *modified by* 356 F. Supp.2d 267 (E.D.N.Y. 2005), *aff'd in part, vacated in part*, 462 F.3d 219 (2d Cir. 2006).

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4. The SG tries to delay resolution of this important constitutional issue by arguing that certiorari is inappropriate for interlocutory appeals. SG Br. at 7-9. But when, as is the case here, further factual development is not necessary, and the case is of "substantial importance," this Court grants certiorari to review interlocutory orders. *See Frisby v. Schultz*, 487 U.S. 474, 478-79 (1988).

In seeking further delay, the government does not and cannot point to evidence that the District Court, which relied on undisputed stipulated factual findings to which all parties agreed, failed to take into account. Nor does it point to evidence the government would present for the first time were the case to return to the District Court. Instead, the government and the Second Circuit focus their criticisms solely on the District Court's legal analysis, arguing that the District Court should be required to apply the "effectively preclude" standard to the record.

If the Circuit's "effective preclusion" test means impossibility, the District Court will have no choice on remand but to find no preclusion, because it is always theoretically possible for a local legal services program to spend its entire budget to satisfy the government's obsession with redundant, separate physical facilities and equipment. On the other hand, if "effective preclusion" means something less than impossibility, the District Court has already made the necessary factual findings quantifying the enormous burdens imposed on petitioners' private speech, and the lack of a justification for those burdens. Accordingly, there simply could not be a starker or more precisely crystallized presentation of this important First Amendment issue.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue.

Respectfully submitted.

PETER M. FISHBEIN
JOSEPH M. DRAYTON
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

BURT NEUBORNE
Counsel of Record
LAURA K. ABEL
REBEKAH DILLER
DAVID H. GANS
DAVID S. UDELL
BRENNAN CENTER FOR JUSTICE
AT NYU LAW SCHOOL
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6737

Attorneys for Petitioners